No. 13389

United States Court of Appeals for the Ninth Circuit

ROLLEY, INC.,

Appellant,

vs.

JAMES L. YOUNGHUSBAND and HOWARD YOUNGHUSBAND, co-partners, doing business as Consolidated Cosmetics and Les Parfums de Dana, Inc.,

Appellees.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division

FILED

PAUL P. O'BRIEN
CLERK

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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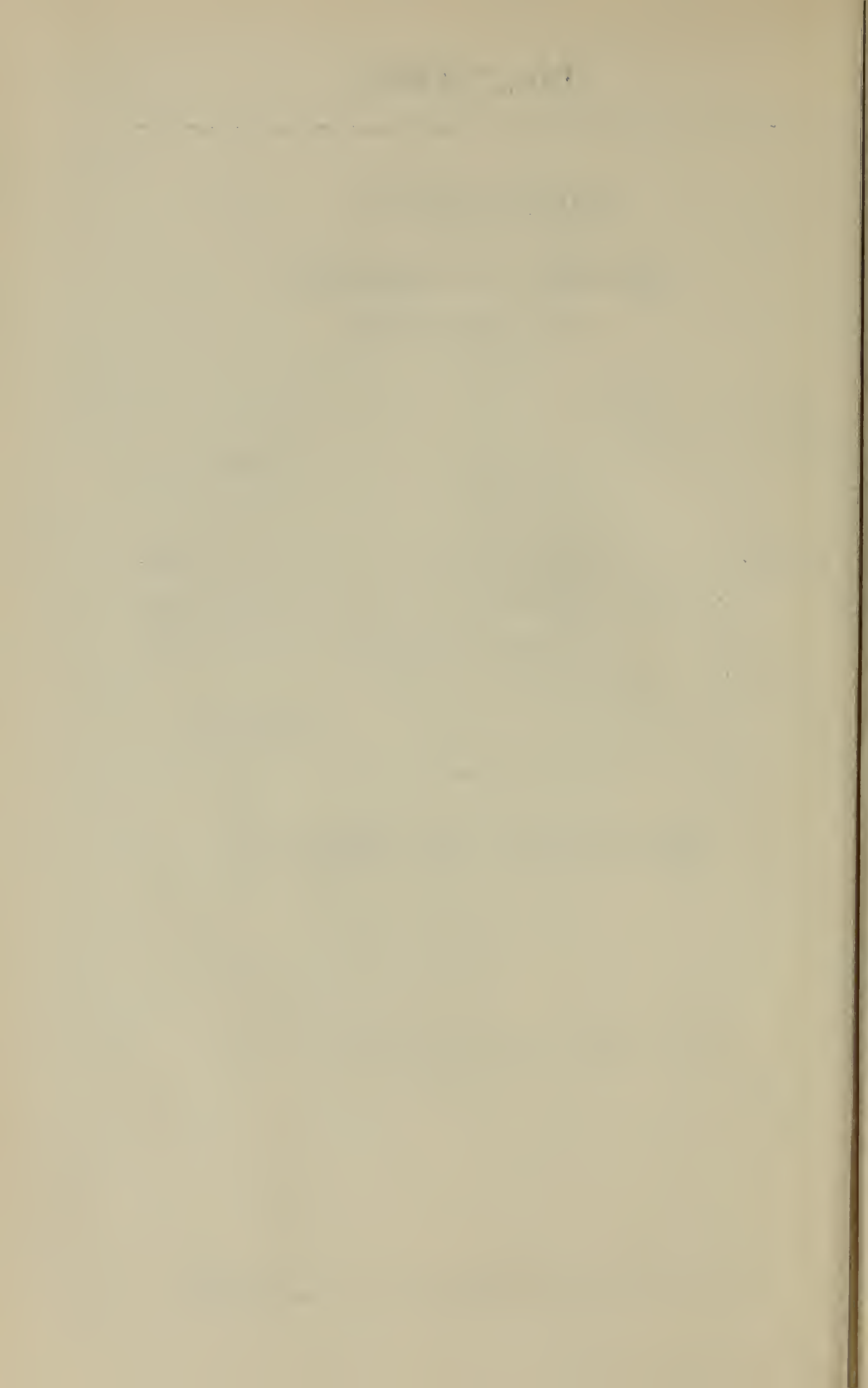

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NAMES AND ADDRESSES OF ATTORNEYS

HARRY GOTTESFELD, Esq.,

JOSEPH A. BROWN, Esq.,

HUTCHINSON & QUATTRIN,

55 New Montgomery St.,
San Francisco, California.
Attorneys for Appellant.

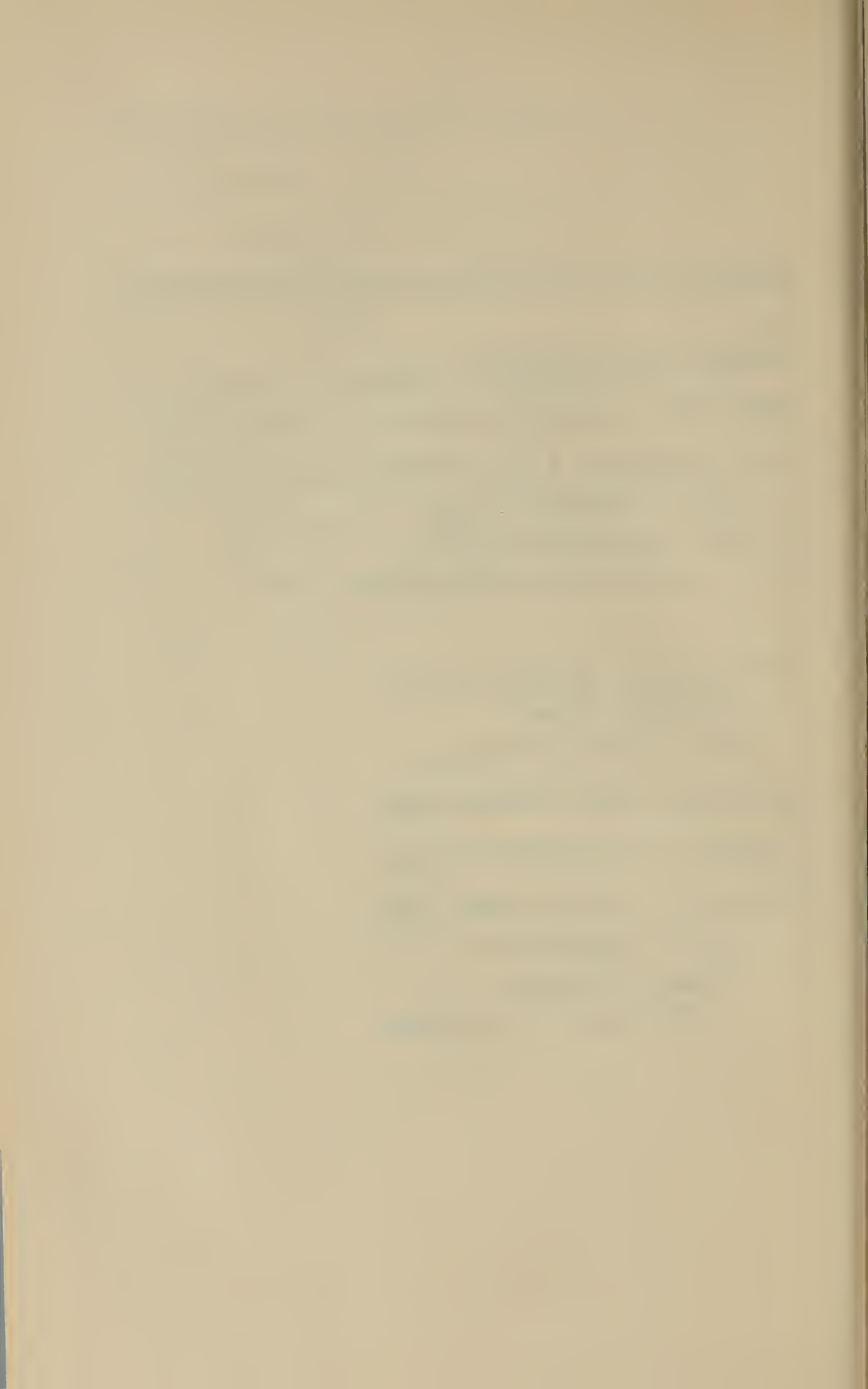
WILLIAM G. MacKAY, Esq.
111 Sutter Street,
San Francisco, California

McKNIGHT and COMSTOCK,

JAMES R. McKNIGHT, Esq.,

ROBERT C. COMSTOCK, Esq.,

1 North LaSalle Street,
Chicago 2, Illinois
Attorneys for Appellees.



In the United States District Court
Northern District of California
Southern Division

Civil Action No. 29,739

JAMES L. YOUNGHUSBAND and HOWARD YOUNGHUSBAND, co-partners, doing business as Consolidated Cosmetics,

Plaintiff,

vs.

ROLLEY, INC.,

Defendant.

COMPLAINT FOR INJUNCTION, PROFITS AND DAMAGES FOR TRADE MARK INFRINGEMENT AND UNFAIR COMPETITION

1. Plaintiff, James L. Younghusband and Howard Younghusband, both residents and inhabitants of the State of Illinois, co-partners doing business as Consolidated Cosmetics, said firm having its principal place of business in Chicago, Illinois, complains against Rolley, Inc., a corporation organized and existing under the laws of the State of California and having its principal place of business at San Francisco, California, a resident and inhabitant of the State of California, and doing business at 182 Geary Street, San Francisco, California, within the Northern District of California, Southern Division.

2. This is an action under the trade mark laws of the United States and between citizens of different states, in which the amount in controversy ex-

ceeds, exclusive of interest and costs, the sum of $3,000.00.

3. Plaintiff is now, and its predecessors before it, have for many years been engaged in the creation, distribution and sale of cosmetics and toilet preparations, and particularly perfumes.

4. Plaintiff is now using and it and its predecessors before it have continuously used the trade marks Tabu, Taboo, Forbidden and Voodoo for many years last past on toilet preparations, cosmetics and perfumes.

5. Plaintiff's said cosmetics and perfumes have maintained the highest degree of quality so that plaintiff's products have acquired an excellent reputation, and plaintiff enjoys a business good will of great value.

6. Plaintiff is now and has been for some time last past the owner of said trade marks Tabu, Taboo, Forbidden and Voodoo and registrations Nos. 314,493, 407,797, 426,323, 343,897, 437,162, 408,529 and 363,746 therefor, issued by the United States Patent Office, and registrations Nos. 27,543, 30,388 and 32,733 issued by the Secretary of State of California, together with the good will of the business and that of its predecessors, and said registrations are valid, subsisting, uncancelled and unrevoked.

7. Plaintiff's said products bearing the aforesaid trade marks Tabu, Taboo, Forbidden and Voodoo have been for many years and are now extensively and nationally advertised and sold, and sales have

been continuously made and are now being made throughout the United States, with the result that said trade marks have become and are identified and associated with plaintiff and its products, and are understood to mean to the trade and the public that products sold under or in connection with said trade marks are the products of plaintiff.

8. Because of the extensive sale, the widespread advertising and the high quality of plaintiff's Tabu, Taboo, Forbidden and Voodoo cosmetic preparations and perfumes, plaintiff owns a valuable asset in the good will associated therewith.

9. Long after plaintiff had established its property rights in its said trade marks Tabu, Taboo, Forbidden and Voodoo, defendants began to advertise and sell and plaintiff is informed and believes that defendant is now selling perfumes and colognes being the trade marks Voodoo and Forbidden Flame perfume and cologne not originating with plaintiff, at and from its store at 182 Geary Street, San Francisco, California, in infringement of plaintiff's said trade marks and defendant is selling said perfumes and colognes as and for plaintiff's genuine Tabu, Taboo, Forbidden and Voodoo perfumes and colognes in unfair competition with plaintiff.

10. The said perfumes and colognes sold by defendant are merchandise of the same descriptive properties as plaintiff's perfume and cosmetics covered by plaintiff's said registrations.

11. The trade marks Voodoo and Forbidden Flame used on and in connection with the said per-

fumes sold by defendant, are used without license or permission of plaintiff, and are colorable imitations and infringements of plaintiff's registered trade marks Tabu, Taboo, Forbidden and Voodoo and said registrations therefor. Such infringing trade mark use and unfair presentation of defendant's said perfumes and colognes to the trade and the purchasing public are calculated to and do create confusion and mistake and cause purchasers to accept defendant's said products as and for plaintiff's products and are calculated to and do cause others handling defendant's said goods to pass them off on the consuming public as and for plaintiff's products, and said acts constitute infringement of plaintiff's products and plaintiff's registered trade mark rights and unfair competition with plaintiff.

12. Defendant's said perfumes are inferior in quality to plaintiff's products and are sold at greatly reduced prices, thereby aggravating the infringement and unfair competition, to plaintiff's greater loss and damage.

13. Defendant, well knowing the premises, and in violation of plaintiff's rights, have, in this District of California, and elsewhere in the United States, deliberately, wantonly and wrongfully committed the acts of trade mark infringement and unfair competition herein complained of on a large and growing scale, and is still so doing and threatening so to do in the immediate future, and plaintiff is still being and will be as long as such acts continue, greatly and irreparably damaged.

Wherefore plaintiff requests:

1. The usual process be issued directed to said defendant commanding it to appear before this Honorable Court on a day certain, there to answer make, and abide the further order of the Court.

2. The issuance of a preliminary injunction during the pendency of this suit and then a permanent injunction restraining and enjoining said defendant, its agents, servants, employees, attorneys and those in active concert or participation with it from in any way, directly or indirectly:

(a) infringing plaintiff's trade marks Tabu, Taboo, Forbidden and Voodoo in the manner herein complained of, or in any manner;

(b) using Forbidden Flame or Voodoo or any designation confusingly similar thereto on or in connection with perfumes, colognes, or any other goods of the same descriptive properties;

(c) reproducing, counterfeiting, copying or colorably imitating without the consent of plaintiff, plaintiff's trade marks Tabu, Taboo, Forbidden or Voodoo and applying or affixing the same to any labels, bottles, or other receptacles, cards, display devices, lists, circulars, signs, prints, packages, wrappers or other things intended to be used upon or in connection with the sale of perfume, cologne or other toilet preparations, and using any such reproduction, counterfeit, copy or colorable imitation in the advertising, offering for sale, selling or distributing of such products;

(d) making, selling, advertising, exhibiting, displaying, offering or announcing for sale, supplying

or distributing perfume or goods of a similar or related kind having applied to the containers, or packages thereof, the designation Forbidden Flame or Voodoo any colorable immitation of plaintiff's trade marks Tabu, Taboo, Forbidden or Voodoo;

(e) making any use of Forbidden or Voodoo orally or in writing save on or in connection with Tabu, Taboo, Forbidden or Voodoo perfume or other toilet preparations originating with plaintiff, and contained in the original sealed retail packages of the plaintiff, as placed on the market by plaintiff;

(f) filling any orders calling for or requesting Tabu, Taboo, Forbidden or Voodoo perfume, or other goods of the same descriptive properties except with the products originating with plaintiff and contained in the original sealed retail packages of the plaintiff as placed on the market by the plaintiff;

(g) preparing, or having prepared, any list including the words Taboo, Tabu, Forbidden or Voodoo or offering, presenting, giving, mailing, sending, publishing or circulating such list to anyone.

3. That said defendant be ordered to deliver up under oath to plaintiff for impounding and destruction, all articles herein held to infringe plaintiff's said trade marks Tabu, Taboo, Forbidden or Voodoo or in unfair competition therewith or in unfair competition with plaintiff, including all trade marks, labels, bottles, cartons, boxes, containers, wrappers, display stands, cards, lists, placards, circulars, radio scripts, together with all plates, molds,

matrices and other instruments and means for making such infringing and unfair copies, and to turn over to plaintiff all of each of defendant's books and records, including ledger accounts and invoices of each of defendant's infringing and unfair sales.

4. That defendant be required by decree of this Honorable Court to account for and pay over to plaintiff such gains and profits as would have accrued to plaintiff but for the unlawful doings of said defendant and all damages that it may have suffered or sustained thereby, and that this Honorable Court may increase the actual damages so assessed against said defendant to a sum equal to three times the sum of such assessment, in view of the wanton and deliberate character of said defendant's trade mark infringement and unfair competititon.

5. That full costs be allowed to plaintiff.

6. That plaintiff may have such other and further relief as to the Court may seem fit.

CONSOLIDATED COSMETICS
/s/ By JAMES R. McKNIGHT,
Attorney
/s/ WILLIAM G. MacKAY,
Attorneys for the Plaintiff.

/s/ ROBERT C. COMSTOCK,
/s/ JAMES R. McKNIGHT,
Of Counsel.

[Endorsed]: Filed May 8, 1950.

In the United States District Court
For the Northern District of California,
Southern Division

No. 29739

JAMES L. YOUNGHUSBAND and HOWARD YOUNGHUSBAND, co-partners, doing business as Consolidated Cosmetics,

Plaintiff,

vs.

ROLLEY, INC.,

Defendant.

ROLLEY, INC.,

Cross-Complainant,

vs.

JAMES L. YOUNGHUSBAND and HOWARD YOUNGHUSBAND, co-partners, doing business as Consolidated, Cosmetics, DANA,

Cross-Defendant.

MOTION FOR LEAVE TO FILE CROSS-COMPLAINT AND BRING IN ADDITIONAL PARTIES

Comes now the defendant and cross-complainant in the above entitled action and respectfully moves the above entitled Court for permission to file a cross-complaint and bring in the additional and further parties, as follows, to wit: I. Magnin's, Bullock's, Owl Drug Company, Robinson's, Haggerty, Sak's, Emporium, Macy's, Hale Bros., City of Paris, H. Liebes & Co., Capwell's, J. Magnin's,

Raphael Weill & Company, White House, Weinstock Lubin, Bon Marche, Appleton & Co., Capwell, Sullivan & Furth's, Kahn's, all in the state of California, on motion and for an order directing the Clerk of this Court to issue a summons direct to each and all of the said cross-defendants requiring them to answer the cross-complaint.

/s/ HARRY GOTTESFELD,
/s/ J. A. BROWN,
/s/ JOHN J. NOONAN,
Attorneys for Defendant and Cross Complainant.

It is so ordered.

Dated: June 7th, 1950.

/s/ HERBERT W. ERSKINE,
Judge, United States District Court, Northern District of California, Southern Division.

[Endorsed]: Filed June 7, 1950.

[Title of District Court and Cause]

ANSWER AND CROSS-COMPLAINT

Comes now the defendant, Rolley, Inc., and denies, admits and alleges as follows:

1.

Admits the allegations of Paragraph 2 of Plaintiff's Complaint;

2.

Denies that the plaintiff herein and/or its predecessors before it have continuously used the tradename "Voodoo" for many years past or otherwise since recently on toilet preparations, cosmetics and perfumes, and denies they have used it on either or any of said products or otherwise or at all until recently;

3.

Denies the allegations of Paragraph 5 of plaintiff's complaint;

4.

Denies that plaintiff is now or for some time past or otherwise or at all has been an owner of the tradename "Voodoo" and alleges that if any Letters Patent or Registrations have issued covering or comprehending this by the United States Patent Office or if the word "Voodoo" has been registered in the office of the Secretary of State of California it has been done illegally and in violation of the continuous prior use of the tradename "Voodoo" by the predecessor of this defendant and by this defendant who is now and for many years continuously, immediately last past, has been the sole owner of the word "Voodoo" and in this behalf that the prior use, by this defendant and its predecessor of the tradename "Voodoo" invalidates any and all trademarks or registrations thereof by the plaintiff herein, and that any such registration of the word "Voodoo" either in the United States Patent Office or in the office of the Secretary of State of California, is invalid for and on account of the fact that

this defendant and its predecessor have continuously used and employed the name "Voodoo" in like kind of products such as perfume, colognes and cosmetics, and the said name belongs to and is the property of this defendant and that any registration thereof in the United States Patent Office or in the office of the Secretary of State of California is void and of no force or effect for and on account of such prior use and employment thereof by this defendant and its predecessor and further this defendant avers and alleges that its predecessor and this defendant have continuously used and employed the word "Voodoo" on its cosmetics and perfumes and colognes and has built up a substantial business in the same and good will therefor and that its property therein is endangered by the transgression of its rights, illegally registered in the United States Patent Office or in the office of the Secretary of State of California, of the said word "Voodoo" and its use on competing products by the plaintiff herein.

5.

Answering the said complaint in paragraph 7 thereof, with respect to the word "Voodoo," the defendant alleges that it has not sufficient information or belief on this subject to enable it to answer, and placing its denial on that ground denies each and all of the allegations of paragraph 7 in relation to the word "Voodoo." In this behalf does aver that this defendant has never used or employed or claimed to use or employ the words Tabu or Taboo or Forbidden and makes no claim to any right or title in

and to the use of said names or tradenames and alleges that it does not use or employ or has it ever used or employed the tradenames Tabu or Taboo or Forbidden in any manner or form.

6.

Answering paragraph 8, denies all of the allegations therein with respect to the tradename "Voodoo."

7.

Answering paragraph 9, denies each and all of the allegations thereof and in reference thereto alleges that this defendant and its predecessor have rightfully, legally and properly and as its property used and employed the word "Voodoo" on its perfumes, colognes and cosmetics many years prior to any illegal use and employment of the word "Voodoo" by the plaintiff and alleges that in truth and in fact the plaintiff is illegally using and employing the tradename "Voodoo" on its perfumes and colognes in unfair competition with this defendant and in the transgression of its rights based upon continuous and prior use and employment of that term in its business and affairs.

8.

Answering paragraph 11, denies that it now uses or has ever used the trademarks Forbidden, Forbidden Flame or Tabu or Taboo in any manner or form; with respect to the word or tradename "Voodoo" this defendant denies that its use thereof and the sale of its products and perfumes are without

right; admits that it uses the word or tradename "Voodoo" without license or permission of the plaintiff and alleges that this defendant requires no license or permission of the plaintiff to so use the same by reason of prior and continuous use it is the property of the defendant and that any use or employment of the tradename "Voodoo" by the plaintiff or any of its customers is a violation and transgression of the rights of this defendant and the plaintiff in respect to the use of the tradename "Voodoo" does so as unfair competition with this defendant in violation of its prior rights thereto; denies all of paragraph 11 with respect to the word "Voodoo" and alleges that this defendant does not use or employ that word on perfumes which are a colorable imitation and/ (or) infringement of plaintiff's alleged registered trademark on "Voodoo" or said alleged illegal, invalid and unlawful registration thereof; denies all of paragraph 11 between the word "Such" on line 18 to and including the word "plaintiff" on line 27 of said paragraph 11 on page 3;

9.

Denies each and all of the allegations of paragraph 12;

10.

Denies each and all of the allegations of paragraph 13 except that this defendant admits that it does use and will continue to use and this defendant and its predecessor have for many years used the word "Voodoo" on its perfumes, colognes and cosmetic products and does so as a matter of right be-

cause of a long sustained prior public use thereof on its merchandise.

And further answering said complaint and by way of cross-complaint avers and alleges:

1.

That the defendant and cross-complainant herein Rolley, Inc., is now and ever since the 30th day of April, 1946, has been a corporation duly organized and existing under and by virtue of the laws of the state of California and having its principal place of business in the city and county of San Francisco; that prior to the organization of said corporation C. A. Rolley was the owner of the business now operated by this corporation under the name and style of Rolley's Perfumes and that he was then engaged in the business of the manufacture and sale of perfumes, colognes and cosmetics and related products; that the said Rolley's Perfumes, so operated by said C. A. Rolley was engaged in business under the said name and style of Rolley's Perfumes continuously for about six years and during said period and commencing on or about the 15th day of April, 1940, created, used and employed the name "Voodoo" in the manufacture and sale of perfumes and colognes and that products under that name and style were manufactured and distributed by him generally throughout the states of California, Oregon, Washington and the District of Columbia and that by reason of the exploitation and advertising of said products, perfumes and colognes under the name of "Voodoo" he acquired large and substantial good

will and said name became, was and is of great value in connection with the sale of perfumes and colognes under that tradename; that upon the formation of this corporation at said date the business of C. A. Rolley under the said name and style of Rolley's Perfumes was sold and transferred to this defendant and cross-complainant and it ever since has been and now is the owner and holder thereof and it has succeeded to and taken over the said tradename of "Voodoo" and has generally continued the operation of said business formerly operated and conducted by the said C. A. Rolley under the name and style of Rolley's Perfumes and has continued to publish and advertise the said name and used and employed it on the sale of its perfumes and colognes and that it is the sole owner of said name and solely entitled to use and employe the same as hereinafter set forth and alleged.

2.

That Rolley, Inc., is a corporation, existing under and by virtue of the laws of the State of California, having its principal place of business at 182 Geary Street, San Francisco, California, complains against James L. Younghusband and Howard Younghusband, both residents and inhabitants of the State of Illinois, co-partners doing business as Consolidated Cosmetics and Dana; said firm having its principal place of business in Chicago, Illinois.

3.

That beginning on or about the 15th day of April, 1940, this defendant and cross-complainant and its

predecessor have been the owners of the tradename "Voodoo" and have used and employed that tradename on its perfumes, cosmetics and other products and have sold the same publicly throughout the west and elsewhere and therefrom have ever since been and now are the legal and lawful owners of the said tradename "Voodoo" in so far as the same relates to such products as perfumes, colognes and cosmetics in all of their varying types, forms and descriptions.

4.

That the plaintiff and cross-defendant herein, James L. Younghusband and Howard Younghusband, doing business as Consolidated Cosmetics and Dana have wrongfully taken and used and employed the word "Voodoo" in violating and transgressing a long-established right of this defendant and cross-complainant in and to the said trade name and have wrongfully procured to be registered the said tradename in the United States Patent Office and in the office of the Secretary of State of California with full knowledge that so doing was wrongful and unfair competition and a transgression of and in violation of the rights of this defendant and cross-complainant in and to the said tradename "Voodoo."

5.

That the plaintiff and cross-defendant herein has in furtherance of its purpose to violate and transgress the rights of the defendant and cross-complainant of and to the said tradename "Voodoo" and to unfairly compete with this defendant and

cross-complainant in the use of said tradename sold competitive products under the said tradename "Voodoo" to the following corporations and individuals doing business in the State of California, to wit: I. Magnin's, Bullock's, Owl Drug Company, Robinson's, Haggerty, all in Los Angeles; Sak's, Wilshire Blvd., Beverly Hills; Emporium, Macy's, I. Magnin's, Hale Bros., City of Paris, H. Liebes & Co., J. Magnin's, Raphael Weill & Company, White House, Owl Drug Company, all in San Francisco; Hale Bros., Owl Drug Company and Appleton & Co., all in San Jose; Capwell, Sullivan & Furth, Capwells, Kahn's and I. Magnin's, all in Oakland; Weinstock Lubin, Bon Marche, all in Sacramento; that each and all of said corporations herein so designated at all of the times have been and now are corporations organized and existing by virtue of the laws of the State of California and owning offices and places of business therein;

6.

That ever since the 15th day of April, 1940, hereinbefore stated defendant and cross-complainant and its predecessor have been and still are the sole proprietors and owners of the tradename "Voodoo" and all right, title and interest in and to the same.

7.

That within two years immediately last past the plaintiff and cross-defendant and the other cross-defendants have infringed and violated the said tradename of this defendant and cross-complainant and have engaged in unfair competition with it by

wrongfully using and employing the said tradename "Voodoo" upon its perfumes, colognes and cosmetics and by selling them to each and all of the corporations herein named and to others elsewhere in the United States and causing them to sell the same and place the same upon the market in unfair competition with this defendant and cross-complainant and in violation and transgression of its rights and property in and to the said tradename "Voodoo" and that the said plaintiff and cross-defendant and the other cross-defendants herein named will, unless enjoined and restrained by this Court, continue to use and employ the said tradename in violation of the rights of this defendant and cross-complainant and notwithstanding that they have been advised and warned to cease and desist from the use and employment of the word "Voodoo" have continued to use the same and will continue so to use and employ.

8.

That the said plaintiff and cross-defendant and the other cross-defendants herein have violated the rights of the defendant and cross-complainant and have willfully and wrongfully committed the acts of tradename infringement and unfair competition and will continue so to do to the irreparable loss, injury and damage of this defendant and cross-complainant unless they are enjoined and restrained from so doing; that the defendant and cross-complainant has been damaged and seriously injured in its business and rights by the said unfair competition and asks that the sum and amount thereof be ascertained and

determined by this Court by the determination of the sales made by all of the cross-defendants herein and by others elsewhere in the United States and the plaintiff and the cross-defendants to the end that the amount, extent and nature of the damage be fixed and determined.

* * * * *

/s/ HARRY GOTTESFELD,
/s/ J. A. BROWN,
/s/ JOHN J. NOONAN,
Attorneys for Defendant and Cross-Defendant.

Duly verified.

[Endorsed]: Filed June 7, 1950.

[Title of District Court and Cause.]

MOTION FOR PRELIMINARY INJUNCTION

To Rolley, Inc., and Harry Gottesfeld, Joseph A. Brown and John J. Noonan, its attorneys:

Please take note that on Monday, October 9, 1950, at 10 o'clock a.m., or as soon thereafter as counsel may be heard, in the Courtroom of the above-entitled Court, in the Post Office Building, Seventh and Mission Streets, in the City and County of San Francisco, State of California, plaintiff will move this Court for a preliminary injunction, for the reasons set forth in the attached motion, the affidavit of John D. Gaumer, and in the attached

brief in support of plaintiff's motion for a preliminary injunction.

/s/ WILLIAM G. MacKAY,
/s/ JAMES R. McKNIGHT,
/s/ ROBERT C. COMSTOCK,
Attorneys for Plaintiff

Acknowledgment of Service attached.

MOTION FOR PRELIMINARY INJUNCTION

Comes now plaintiff herein and moves that a preliminary injunction be entered restraining and enjoining defendant from bringing, threatening to bring or prosecuting any lawsuits against plaintiff's customers or prospective customers or adding or proceeding against them as cross-defendants to any cross-complaint filed by defendant in this suit and for cause plaintiff shows:

1. The affidavit of John D. Gaumer shows that plaintiff filed its complaint herein alleging ownership of the trade mark Voodoo for perfume and that defendant had infringed this trade mark by selling perfume not originating with plaintiff bearing the trade mark Voodoo. Exhibit A is a copy of plaintiff's registration of the trade mark Voodoo, No. 363,746 issued by the United States Patent Office on January 3, 1939.

2. The affidavit further shows that defendant filed a cross-complaint alleging that it owned the trade mark Voodoo but claiming no priority of use

over plaintiff's registration No. 363,746 but alleging that plaintiff had infringed its alleged common law rights.

3. Defendant obtained an ex parte order without notice on June 7, 1950 adding 21 of plaintiff's customers as parties-defendant to defendant's cross-complaint, for the same cause of action as defendant alleged in its cross-complaint against plaintiff.

4. The affidavit shows that defendant's attitude is to threaten plaintiff's customers by adding 21 of them to the cross-complaint and the defendant may file suits against substantially all of plaintiff's customers and prospective customers.

5. Plaintiff has been put to great expense, annoyance and harassment by the actions of defendant and may be required to furnish indemnity agreements to its customers and to undertake the defense of such customers in this suit and in further suits which defendant may bring against plaintiff's customers.

6. Plaintiff has been and is being greatly and irreparably damaged by the threats of defendant in adding 21 of its customers to defendant's cross-complaint in this case and the expectation of other suits and will continue to be so damaged unless defendant is enjoined by this Court. Plaintiff is financially responsible and defendant will not suffer any damage or loss by the entry of such an injunction which will serve to protect the jurisdiction of this Court and to save plaintiff and its customers for improper and unfair harassment and injury.

Wherefore plaintiff prays that the attached injunction should be entered herein.

/s/ WILLIAM G. MacKAY,
/s/ JAMES R. McKNIGHT,
/s/ ROBERT C. COMSTOCK,
Attorneys for Plaintiff

AFFIDAVIT OF JOHN D. GAUMER

State of Illinois,
County of Cook—ss.

John D. Gaumer, being first duly sworn deposes and says that he is Manager of Consolidated Cosmetics, the plaintiff in the above entitled case; that prior to the filing of the complaint in this case that he had read said complaint and knew that the facts stated therein were true; that plaintiff and its predecessors before it have for many years been engaged in the creation, distribution and sale of perfumes and cosmetics; that plaintiff has maintained the highest degree of quality in its cosmetics and perfumes so that plaintiff's products have acquired an excellent reputation and plaintiff enjoys a business good-will of great value; that plaintiff and its predecessors have continuously used the trade mark Voodoo on and in connection with perfume and other cosmetics; that plaintiff's predecessors obtained registration No. 363,746 for the trade mark Voodoo on perfume and other cosmetics from the United States Patent Office on January 3, 1939 on an application filed September 10, 1938; and that at the time of the filing of the complaint, plaintiff was the

owner of the trade mark Voodoo for perfume and other cosmetics and said United States registration therefor, No. 363,746, as well as registration No. 32733 issued to it by the Secretary of State of the State of California, and that said registrations are valid, subsisting, uncancelled and unrevoked. A copy of plaintiff's United States registration No. 363,746 is attached hereto and made a part hereof as Exhibit 1.

Affiant further states that Plaintiff's Voodoo perfume has been so extensively and nationally advertised and sold throughout the United States, including the State of California, that the trade mark Voodoo as alleged in the complaint has become identified and associated with plaintiff.

Affiant further states that it has distributed its Voodoo perfume through department and drug stores and that among its customers are the following: I. Magnin's, Bullock's, Owl Drug Company, Robinson's, Haggerty, all in Los Angeles; Sak's, Wilshire Blvd., Beverly Hills; Emporium, Macy's, I. Magnin's, Hale Bros., City of Paris, H. Liebes & Co., J. Magnin's, Raphael Weill & Company, White House, Owl Drug Company, all in San Francisco; Hale Bros., Owl Drug Company and Appleton & Co., all in San Jose; Capwell, Sullivan & Furth, Capwells, Kahn's and I. Magnin's, all in Oakland; Weinstock Lubin, Bon Marche, all in Sacramento.

Affiant further states as alleged in the complaint that long after plaintiff had established its prop-

erty rights in its said trade mark Voodoo that defendant began to advertise and sell perfume and cologne bearing the trade mark Voodoo which did not originate with plaintiff and which defendant sold at and from its store at 182 Geary Street, San Francisco, California, in infringement of plaintiff's said trade mark.

Affiant further states that in paragraph 5 of its cross-complaint, defendant alleges the following:

"That the plaintiff and cross-defendant has in furtherance of its purpose to violate and transgress the rights of the defendant and cross-complainant of and to the said trade-name 'Voodoo' and to unfairly compete with this defendant and cross-complainant in the use of said trade-name sold competitive products under the said trade-name 'Voodoo' to the following corporations and individuals doing business in the State of California, to wit: I. Magnin's, Bullock's, Owl Drug Company, Robinson's, Haggerty, all in Los Angeles; Sak's, Wilshire Blvd., Beverly Hills; Emporium, Macy's, I. Magnin's, Hale Bros., City of Paris, H. Liebes & Co., J. Magnin's, Raphael Weill & Company, White House, Owl Drug Company, all in San Francisco; Hale Bros., Owl Drug Company and Appleton & Co., all in San Jose; Capwell, Sullivan & Furth, Capwells, Kahn's and I. Magnin's, all in Oakland; Weinstock Lubin, Bon Marche, all in Sacramento; that each and all of said corporations herein so designated at all of the times have been and now are corporations organized and existing by virtue

of the laws of the State of California and owning offices and places of business therein;"

On June 7, 1950, the Court entered an ex parte order obtained without notice to plaintiff, approving the following motion of plaintiff:

"Comes Now the defendant and cross-complainant in the above entitled action and respectfully moves the above entitled Court for permission to file a cross-complaint and bring in the additional and further parties, as follows, to wit: I. Magnin's, Bullock's, Owl Drug Company, Robinson's, Haggerty, Sak's, Emporium, Macy's, Hale Bros., City of Paris, H. Liebes & Co., Capwell's, J. Magnin's, Raphael Weill & Company, White House, Weinstock Lubin, Bon Marche, Appleton & Co., Capwell, Sullivan & Furth, Kahn's, all in the state of California, on motion and for an order directing the Clerk of this Court to issue a summons direct to each and all of the said cross-defendants requiring them to answer the cross-complaint."

Plaintiff promptly filed a motion to set aside the ex parte order entered June 7, 1950 among other grounds on the ground that plaintiff will be seriously damaged and injured if this order is not set aside. The order names a total of 21 of the leading drug and department stores throughout the entire State of California as defendants to the cross-complaint. Plaintiff believes that defendant's purpose is to harass plaintiff and its customers. It is further noted that many of the defendants are not even within this judicial district and are not

subject to suit in this Court. The bringing of suits against customers of a manufacturer constitutes unfair competition and is not proper where the Court already has jurisdiction of the real parties to the controversy.

Affiant further states that all of the stores named in paragraph 5 of the cross-complaint and in the ex parte order entered June 7, 1950 are all plaintiff's customers and each and all of them have purchased plaintiff's Voodoo perfume. Affiant believes that none of these 21 stores is a customer of defendant. Defendant has endeavored to add 21 of plaintiff's customers to this suit as a threat to the entire industry and indicates an intention on the part of defendant to sue other of plaintiff's customers in this suit and other suits to be filed. This is solely for the purpose of harassing plaintiff and unfairly preventing the sale of plaintiff's merchandise by intimidating its dealers.

Affiant states that if any of plaintiff's customers are served as parties-defendant to this or any other suit, or are threatened with suit, that they will either discontinue selling plaintiff's Voodoo perfume or demand protection by a satisfactory bond at plaintiff's expense and require plaintiff in effect to substitute itself for the customer sued. Any threat of suit would have the effect of causing others who hear of the threats to immediately discontinue plaintiff's line. If a large number of plaintiff's customers were sued, such as the 21 customers named in the cross-complaint, the effect

would be ruinous to plaintiff's business. All such customers, and others hearing of it, would drop plaintiff's products or require plaintiff to put up expensive bonds and engage in a multiplicity of defenses. Since defendant has the plaintiff in court for any claim it desires to assert against plaintiff, no good cause may be served by any one of plaintiff's customers being sued, either in this suit or any other suit.

Plaintiff is a well-established and nationally known concern and is fully responsible to respond in this suit to any action brought by the defendant in its cross-complaint, and defendant will be fully protected in whatever rights it has in the trade mark as against the plaintiff, who is the manufacturer and distributor, without resorting to adding any of plaintiff's customers in this suit or suing any of plaintiff's customers in any other suit.

/s/ JOHN D. GAUMER

Subscribed and sworn to before me this 7th day of August, 1950.

[Seal] /s/ EVELYNNE G. KLEPAL

EXHIBIT No. 1

Registered Jan. 3, 1939 Trade-Mark 363,746

Republished, under the Act of 1946, Aug. 9, 1949, by Consolidated, Cosmetics, Chicago, Ill.

United States Patent Office
Associated Distributors, Inc., Chicago, Ill.

Act of February 20, 1905

Application September 10, 1938, Serial No. 410,423

VOODOO

Statement

To the Commissioner of Patents:

Associated Distributors, Inc., of Chicago, Illinois, a corporation duly organized and existing under and by virtue of the laws of the State of Illinois, doing business at 11 East Hubbard Street, Chicago, Illinois, has adopted and used the trade-mark shown in the accompanying drawing, for Lipstick, Rouge, Face Powder, Eyelash and Eyebrow Mascara, Pads Impregnated with Suntan and Cleansing Lotion, Creams for the Hands and Face; Preparations for Skin, Hair and Fingernails; and Perfumes, in Class 6, Chemicals, medicines, and pharmaceutical preparations, and presents herewith five specimens of the trade-mark as actually used by applicant upon the goods and requests that the same be registered in the United States Patent Office in accordance with the act of February 20, 1905. The trade-mark has been continuously used and applied

to said goods in the business of applicant since April 10, 1937. The trade-mark is applied or affixed to the goods or to the packages containing the same by placing thereon a printed label on which the trade-mark is shown.

The undersigned hereby appoints James R. McKnight, whose postal address is One North La Salle Street, Chicago, Illinois, and who is registered in the United States Patent Office as No. 12,110, its attorney, to prosecute this application for registration, with full powers of substitution and revocation, to make alterations and amendments therein, to receive the certificate and to transact all business in the Patent Office connected therewith.

ASSOCIATED DISTRIBUTORS, INC.,
By J. L. YOUNGHUSBAND,
President.

INJUNCTION ORDER

This cause coming on to be heard on plaintiff's motion for preliminary injunction and sworn affidavit in support thereof and the Court having considered said motion and affidavit and the briefs of both parties and the record herein and being fully advised in the premises, and it appearing to the Court that plaintiff will be irreparably injured by the adding, or threatening to add or prosecuting plaintiff's customers in the cross-complaint in this case, or by the filing, threatening and prosecution of further suits by defendant against plaintiff's customers unless defendant is enjoined by this

Court, it is hereby ordered, adjudged and decreed that:

A writ of injunction issue enjoining and restraining defendant, its officers, agents, employees, attorneys and those in active concert or participation with it from adding or threatening to add, or prosecuting in the cross-complaint in this case any of plaintiff's customers, or from bringing any further suit against plaintiff's customers or prospective customers which tenders as an issue therein the right of the plaintiff to manufacture, or of such customers to purchase, advertise, or sell in any lawful manner the plaintiff's Voodoo perfume, cologne or other cosmetics.

It is further ordered that this injunction shall remain in full force and effect until the final determination of this cause.

....

United States District Judge.

[Endorsed]: Filed Aug. 17, 1950.

[Title of District Court and Cause.]

INJUNCTION ORDER

This cause coming on to be heard on plaintiff's motion for preliminary injunction and sworn affidavit in support thereof and the Court having considered said motion and affidavit and the briefs of both parties and the record herein and being fully advised in the premises, and it appearing to the

Court that plaintiff will be irreparably injured by the adding, or threatening to add or prosecuting plaintiff's customers in the cross-complaint in this case, or by the filing, threatening and prosecution of further suits by defendant against plaintiff's customers unless defendant is enjoined by this Court, it is hereby ordered, adjudged and decreed that:

A writ of injunction issue enjoining and restraining defendant, its officers, agents, employees, attorneys and those in active concert or participation with it from adding or threatening to add, or prosecuting in the cross-complaint in this case any of plaintiff's customers, or from bringing any further suit against plaintiff's customers or prospective customers which tenders as an issue therein the right of the plaintiff to manufacture or of such customers to purchase, advertise or sell in any lawful manner the plaintiff's Voodoo perfume, cologne or other cosmetics.

It is further ordered that this injunction shall remain in full force and effect until the final determination of this cause.

Dated: December 28, 1950.

/s/ HERBERT W. ERSKINE,
United States District Judge.

Entered in civil docket Dec. 29, 1950.

[Endorsed]: Filed Dec. 28, 1950.

[Title of District Court and Cause]

ANSWER TO CROSS COMPLAINT

Comes now James L. Younghusband and Howard Younghusband, co-partners, doing business as Consolidated Cosmetics, plaintiff and makes the following answer to the cross complaint filed herein by defendant Rolley, Inc.

1. Plaintiff admits that Rolley, Inc., is a corporation, organized and existing under the laws of the State of California with its principal place of business in San Francisco and that C. A. Rolley was the owner of the business now operated by Rolley, Inc. and that he was then engaged in the business of the manufacture and sale of perfumes and colognes. Further answering paragraph 1 of the cross complaint, plaintiff is without knowledge or information sufficient to form a belief as to whether or not Rolley, Inc. was organized on April 30, 1946, or that C. A. Rolley was engaged in business under the name and style of Rolley's Perfumes continuously for about six years, and plaintiff denies that C. A. Rolley during said six year period, or commencing on or about April 15, 1940 created or used or employed the name Voodoo in the manufacture or sale of perfumes or colognes or that products under that name or style were manufactured and distributed by him generally or otherwise throughout the states of California, Oregon, Washington or the District of Columbia or that by reason of the alleged exploitation or alleged advertising of said alleged

products, perfumes or colognes under the name of Voodoo he acquired large or substantial or any good will or said name became, was or is a great or any value in connection with the sale of perfumes or colognes under that tradename or that Rolley, Inc. has succeeded to or taken over the said tradename Voodoo or has acquired any rights in and to said trade mark, or has continued to publish or advertise said trade mark or that it is the sole owner or any owner of the trade mark Voodoo or solely or otherwise entitled to use it, and plaintiff leaves defendant Rolley, Inc. to its strict proof thereof.

2. Plaintiff answering paragraph 2 of the cross complaint admits that Rolley, Inc. is a California corporation with its principal place of business at 182 Geary Street, San Francisco, California and that James L. Younghusband and Howard Younghusband are co-partners doing business as Consolidated Cosmetics with its principal place of business in Chicago, Illinois.

3. Plaintiff answering paragraph 3 of the cross complaint denies that defendant cross-complainant or its predecessor or either of them has ever been or is now the owner of the trade mark or trade name Voodoo. Plaintiff admits that defendant and C. A. Rolley have sold perfume and cologne bearing the trade mark Voodoo in infringement of plaintiff's registered trade mark Voodoo but plaintiff denies that beginning on or about the 15th day of April, 1940, this defendant and cross-complainant or its predecessor have been the owners of the trade

name Voodoo, have sold Voodoo perfumes, cosmetics and other products publicly throughout the west or elsewhere or have been or are now the legal or lawful owners of the said trade name Voodoo in so far as the same relates to such products as perfumes, colognes or cosmetics in all of their varying types, forms and descriptions.

4. Plaintiff answering paragraph 4 of the cross complaint denies that it has wrongfully taken or used or employed the word Voodoo or has violated and transgressed a long established or any right of the defendant in or to the said trade name or has wrongfully procured to be registered the said trade name in the United States Patent Office or in the office of the Secretary of State of California with full knowledge that so doing was wrongful or unfair competition or a transgression of or in violation of the rights of defendant in and to the said trade name Voodoo and plaintiff alleges that its registrations of the trade mark Voodoo No. 363,746 issued by the United States Patent Office and No. 32,733 issued by the Secretary of State of California were rightfully and legally obtained and that defendant had no right to the trade mark Voodoo at the time of said registrations or at any time and has now no right to the trade mark Voodoo or to contest or challenge the right of plaintiff thereto.

5. Answering paragraph 5 of the cross complaint, plaintiff denies that it has any purpose to or does violate or transgress any rights of the defendant and denies that defendant has now or ever has had

any rights to the trade mark Voodoo, and plaintiff denies that any use of the trade mark Voodoo that it has made violates or transgresses any rights of defendant or competes unfairly with defendant. Plaintiff further alleges that it has sold perfume and cologne bearing the trade mark Voodoo to the corporations and individuals named in paragraph 5 of the cross complaint but not in competition with defendant, because defendant is not now selling and plaintiff is informed and believes has never sold any perfumes or colognes to said corporations and individuals.

6. Answering paragraph 6 of the cross complaint, plaintiff denies that since April 15, 1940 or any other time, defendant or its predecessor have been or still are the sole or any proprietors or owners of the trade mark or trade name Voodoo or all or any right, title or interest therein and plaintiff alleges that prior to April 15, 1940 when defendant claims to have created, adopted and first used the trade mark Voodoo, plaintiff's predecessor was the owner of the then existing registration No. 363,746 for the trade mark Voodoo issued by the United States Patent Office on January 3, 1939.

7. Answering paragraph 7 of the cross complaint, plaintiff denies that within the last two years or at any time has it infringed or violated any trade name of defendant or engaged in unfair competition with it by using or employing the trade name Voodoo upon its perfumes, colognes or cosmetics or by selling them to each or all of the corporations herein

named or to others elsewhere in the United States or causing them to sell the same or place the same upon the market in alleged unfair competition with defendant or in alleged violation or transgression of any alleged rights or property in and to the said trade name Voodoo and plaintiff further alleges that its use of its registered trade mark Voodoo on its perfumes and colognes is lawful and proper and in no way a violation of any rights of defendant.

8. Answering paragraph 8 of the cross complaint, plaintiff denies that it has violated any rights of defendant or has willfully or wrongfully committed any acts of trade name infringement or unfair competition or will continue so to do to the irreparable loss, injury or damage of defendant unless enjoined or restrained from so doing. Plaintiff denies that defendant has been damaged or injured in its business or rights by any unfair competition or acts by plaintiff and plaintiff further denies that defendant has been injured or damaged to any amount and leaves defendant to its strict proof thereof.

9. Further answering the cross complaint, plaintiff alleges that defendant has infringed plaintiff's registered trade mark Voodoo and other trade marks as set forth in the complaint in this case and that defendant and/or its predecessor C. A. Rolley have long copied the well known trade marks of famous perfume houses and come into Court with unclean hands.

Wherefore plaintiff requests that the cross complaint be dismissed at defendant's cost.

JAMES L. YOUNGHUSBAND and HOWARD YOUNGHUSBAND, doing business as Consolidated Cosmetics.

/s/ By JAMES R. McKNIGHT,
Attorney.

/s/ WILLIAM G. MacKAY,
Attorney.

/s/ ROBERT C. COMSTOCK,
Of Counsel.

Acknowledgment of Service attached.

[Endorsed]: Filed Jan. 16, 1951.

[Title of District Court and Cause]

SUPPLEMENTAL ORDER

The injunction order issued by this Court on December 28th, 1950, is hereby amended by the addition of the following paragraph:

"In accordance with Rule 65(c) of the Federal Rules of Civil Procedure plaintiff shall give security in the sum of $500.00, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained."

Dated: January 30th, 1951.

/s/ HERBERT W. ERSKINE,
United States District Judge.

[Endorsed]: Filed Jan. 30, 1951.

[Title of District Court and Cause]

WRIT OF INJUNCTION

To Rolley, Inc. Greeting:

Whereas, by an order entered herein on December 28, 1950, it appears to the court that plaintiff will be irreparably injured by the adding, or threatening to add or prosecuting plaintiff's customers in the cross-complaint in this case, or by the filing, threatening and prosecution of further suits by defendant against plaintiff's customers unless defendant is enjoined by this court.

Now, therefore, we do hereby command and strictly enjoin and restrain you, the said Rolley, Inc., your officers, agents, employees, attorneys and those in active concert or participation with you from adding or threatening to add, or prosecuting in the cross-complaint in this case any of plaintiff's customers, or from bringing any further suit against plaintiff's customers or prospective customers which tenders as an issue therein the right of the plaintiff to manufacture or of such customers to purchase, advertise or sell in any lawful manner the plaintiff's Voodoo perfume, cologne or other cosmetics, until the final determination of this cause, upon the filing and undertaking executed by an approved surety company in the sum of $500.00, which has been duly filed and approved by the Court.

Which commands and injunctions you are respectfully required to observe and obey until our said District Court shall make further order in the premises.

Hereof fail not, under the penalty of the law thence ensuing.

[Seal] /s/ C. W. CALBREATH,
Clerk.

Dated: Feb. 1, 1951.

[Endorsed]: Filed Feb. 1, 1951.

[Title of District Court and Cause]

ORDER

It is hereby ordered that Les Parfums de Dana, Inc., a corporation, be added as a party-plaintiff in the above-entitled action in view of the assignment of the trademark Voodoo and registration No. 363,-746 from Consolidated Cosmetics, a co-partnership composed of James L. Younghusband and Howard Younghusband, to Les Parfums de Dana, Inc., and on the express terms and conditions that all of the records and pleadings now on file in the above-entitled action shall fully apply to and be expressly binding in all respects on the said assignee, Les Parfums de Dana, Inc.

Dated: April 30, 1951.

/s/ GEORGE B. HARRIS,
United States District Judge.

[Endorsed]: Filed April 30, 1951.

In the United States District Court
Northern District of California,
Southern Division

Civil Action No. 29,739

JAMES L. YOUNGHUSBAND and HOWARD YOUNGHUSBAND, co-partners, doing business as Consolidated Cosmetics, and LES PARFUMS de DANA, Inc.,

Plaintiffs,

vs.

ROLLEY, INC.,

Defendant.

FINAL JUDGMENT

This cause coming on to be heard, and the Court being fully advised in the premises, the Court enters the following Findings of Fact, Conclusions of Law and Decree:

FINDINGS OF FACT

1. Plaintiffs James L. Younghusband and Howard Younghusband are both residents and inhabitants of the State of Illinois, co-partners doing business as Consolidated Cosmetics, said firm having its principal place of business in Chicago, Illinois, and plaintiff Les Parfums de Dana, Inc., is a New York corporation have its principal place of business in New York, New York.

2. Defendant, Rolley, Inc., is a California corporation with its principal address at San Francisco, California.

3. Plaintiff Les Parfums de Dana, Inc., has

adopted and used, is now using and is the sole and lawful owner of the trade mark Voodoo for perfumes, colognes and other cosmetics and registration No. 363,746 of January 3, 1939, therefore issued by the United States Patent Office on said date, and is the successor to plaintiffs James L. Younghusband and Howard Younghusband doing business as Consolidated Cosmetics, who were the owners of the said trade mark Voodoo at the time of the filing of the complaint herein.

4. Plaintiffs' said products bearing said trade mark have been and are now extensively advertised and sold in interstate commerce so that said products bearing said trade mark are well and favorably known and are understood by the trade and public to be the plaintiffs' products.

5. Said defendant Rolley, Inc., has at dates later than the first use of the trade mark Voodoo by plaintiffs and without plaintiffs' consent used the trade mark Voodoo on and in connection with the sale of perfume and toilet water, which were not products of plaintiffs.

6. The said use of plaintiffs' trade mark by said defendant in connection with said defendant's offering for sale and sale of perfume and toilet water not originating with plaintiffs is likely to cause confusion in the minds of the purchasing public and has caused injury to the plaintiffs.

7. Plaintiffs James L. Younghusband and Howard Younghusband doing business as Consolidated Cosmetics have adopted and used, are now using and are the sole and lawful owners of the trade marks

Tabu, Taboo and Forbidden for perfumes, colognes and other cosmetics, and registrations Nos. 314,493 of July 3, 1934; 407,797 of June 27, 1944, and 426,-323 of December 24, 1946, for Tabu, Nos. 343,897 of March 9, 1937, and 437,162 of March 9, 1948, for Taboo and No. 408,529 of August 15, 1944, for Forbidden, all issued by the United States Patent Office on said respective dates.

8. The defendant having abandoned the trade mark Forbidden Flame and discontinued its use, there is no need for any further finding of fact or order thereon.

CONCLUSIONS OF LAW

9. This Court has jurisdiction of the plaintiffs and the said defendant and over the controversy involved in this action.

10. The trade mark Voodoo used by plaintiff Les Parfums de Dana, Inc., on perfumes, colognes and other cosmetics and registration No. 363,746 therefor issued by the United States Patent Office and owned by said plaintiff is good and valid in law.

11. Said defendant, Rolley, Inc., has infringed plaintiffs' said registered trade mark Voodoo by the use of the Voodoo trade mark on and in connection with the offering for sale and the sale of perfume and toilet water not originating with plaintiffs and without plaintiffs' consent, and said defendant has engaged in unfair competition with plaintiffs in offering for sale and selling perfume and toilet water as and for Voodoo, which did not originate with plaintiff.

12. Plaintiffs are entitled to a permanent injunc-

tion against said defendant to restrain said trade mark infringement and unfair competition.

DECREE

It is hereby ordered, adjudged and decreed:

13. That said defendant, Rolley, Inc., its respective agents, officers, servants, employees and attorneys and all persons in active concert or participation or privity with it is hereby forever enjoined and restrained from in any way, directly or indirectly:

(a) infringing plaintiffs' registered trade mark Voodoo by using Voodoo or any other trade mark confusingly similar thereto on or in connection with perfumes, colognes, cosmetics, or any other goods or services on or in connection with which such use is likely to cause confusion or mistake or to deceive purchasers as to the source of origin of such goods or services;

(b) selling, offering for sale or advertising perfume, cologne, or other goods of the same descriptive properties bearing the trade mark Voodoo;

(c) making any use of Voodoo orally or in writing, except in connection with the original sealed retail packages of the plaintiffs as placed on the market by the plaintiffs;

(d) filling any orders calling for or requesting Voodoo cologne, or other goods of the same descriptive properties except with the products originating with plaintiffs and contained in the complete un-

opened original sealed retail packages of the plaintiffs as placed on the market by the plaintiffs;

(e) preparing any list including the trade mark Voodoo or offering, presenting, giving, mailing, sending, publishing or circulating such list to anyone.

14. That the plaintiffs be discharged from the bond on the preliminary injunction provided for in the order of Judge Erskine of December 28, 1950, and that said injunction be made permanent and final "enjoining and restraining defendant, its officers, agents, employees, attorneys and those in active concert or participation with it from adding or threatening to add, or prosecuting in the cross-complaint in this case any of plaintiff's customers, or from bringing any further suit against plaintiff's customers or prospective customers which tenders as an issue therein the right of the plaintiff to manufacture or of such customers to purchase, advertise or sell in any lawful manner the plaintiff's Voodoo perfume, cologne or other cosmetics."

15. That the defendant deliver up to plaintiff's counsel all labels, signs, prints, advertising leaflets, catalogs, price lists, packages, wrappers, receptacles and other things, and all plates, molds and other devices for making the same, in the possession or under the control of the defendant which unlawfully bear the designation Voodoo.

16. That defendant's cross-complaint herein be dismissed.

17. That there is no award of damages to plaintiffs.

18. That defendant pay the taxable costs of this action to plaintiffs.

Dated: This 21st day of March, 1952.

/s/ MICHAEL J. ROCHE,
United States District Judge.

Acknowledgment of Service attached.

[Endorsed]: Filed March 21, 1952.

[Title of District Court and Cause.]

MOTION FOR A NEW TRIAL

Now Comes the defendant and cross-complainant Rolley, Inc., and respectfully moves the Court for an order granting a new trial and for a new trial in the above-entitled action after entry of judgment and decree perpetually enjoining defendant and cross-complainant from using a trade name and mark adopted and owned by it and directing defendant and cross-complainant to deliver certain of its property to plaintiffs and for costs, on each of the following grounds, namely:

I.

The evidence is insufficient to justify the judgment, including, but not limited to, findings respectively numbered 3, 4, 5 and 6.

II.

The judgment is contrary to the evidence, including, but not limited to, the findings thereof respectively numbered 3, 4, 5 and 6.

III.

The judgment is contrary to law and equity, and more particularly in that it would declare valid and protectible by injunctive processes of the Court a trade name and mark resting entirely upon registration with appropriate agencies of the United States of America, but not with those of the States of California, Washington, Oregon, Nevada, the territories of Alaska and Hawaii or the District of Columbia—(1) without any evidence whatever of actual use of the trade name and mark in said places above named or elsewhere; (2) without any pretended use of the trade name and mark for more than four years after registration; (3) when a pretended use for less than two years was voluntarily abandoned without lawful excuse or explanation and remained so abandoned for more than three and one-half years and six years prior to the commencement of the instant action, and (4) in the face of cross-complainant's lawful appropriation and extensive, open, notorious and continuous use of the trade name and mark, as shown by undisputed and unquestioned documentary evidence, for more than five years prior to the commencement of the action following the appropriation and prior use theretofore of the trade name and mark by plaintiff's predecessor in interest for more than

three years, as shown by such documentary evidence, such use having been made, generally and throughout the states, territories and other places above named;

IV.

Irregularities in the proceedings of the Court and on the part of plaintiffs by which cross-complainant was prevented from having a fair trial, including, but not limited to: (1) the presentation and receipt of evidence respecting asserted conduct by the predecessor in interest of cross-complainant, relating to (a) other and unrelated trade names and marks asserted by plaintiffs and (b) asserted trade names and marks not owned or claimed by any party, or any predecessor in interest of any party, to the action; (2) the overruling of cross-complainant's timely and valid objections to the offering and receipt of such evidence; and (3) the denial of cross-complainant's timely and appropriate motion to deny said evidence;

V.

The judgment and decree includes unnecessary and mischievous recitals of purported fact, including, but not limited to, those set forth in paragraphs 7 and 8 of the findings therein, which are also contrary to the unconflicting evidence in that such establishes: (1) that neither cross-complainant nor its predecessor in interest has ever used any of the trade names or marks set forth in paragraph 7 of

said findings; (2) that the appropriation and use of the trade name and mark Forbidden Flame was, in fact, adopted and used by cross-complainant's predecessor in interest prior to any asserted registration or use of the trade name and mark Forever referred to therein; and (3) cross-complainant has not at any time used any of the names, or any name bearing any resemblance to any of the names, set forth in paragraphs 7 and 8 of said findings;

VI.

The conclusions of law in paragraph 9 through 12 set forth in said decree are contrary to the evidence and to law, in such cases made and provided, and to applicable principles of equity;

VII.

The provisions of paragraph 13 through 14 are contrary to the evidence and to law, in such cases made and provided, and to applicable principles of equity.

VIII.

The provisions of paragraph 15 of the said judgment and decree is erroneous and would unconstitutionally deprive cross-complainant of its property and require the delivery of the same to plaintiffs without consideration and without due process of law;

IX.

The judgment and decree would erroneously di-

rect the dismissal of the cross-complaint herein of defendants and cross-complainant;

X.

The judgment and decree would erroneously provide for the imposition of costs upon the cross-complainant, whereas a substantial and major portion of the relief herein sought by plaintiffs will have been denied plaintiffs and a major portion of such costs relate to issues as to which such relief will have been so denied;

Said motion is made and based upon the grounds hereinabove set forth and is made and based upon the pleadings, the transcript of the testimony and oral proceedings, heretofore transcribed and filed herein, and the documentary evidence received upon this written motion and a notice of time and place of hearing the same and upon each of the whole thereof.

HARRY GOTTESFELD,
JOSEPH A. BROWN,
HUTCHINSON & QUATTRIN,
/s/ By J. ALBERT HUTCHINSON,
Attorneys for Defendant and Cross-Complainant

Points and Authorities

Rule 59 of the Rules of Civil Procedure: Sections: 14202, 14270, 14400 of the Business and Professions Code of the State of California.

Rainier Brewing Co. vs. McCalgon, 94 C. A. (2d) 118, 121. 52 Am. Jur. 572, Trade-marks, par 90.

Respectfully submitted,

HARRY GOTTESFELD,
HUTCHINSON & QUATTRIN.
/s/ J. ALBERT HUTCHINSON,
Attorneys for Defendant and Cross-Complainant

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 31, 1952.

[Title of District Court and Cause.]

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR A NEW TRIAL

Plaintiffs respond as follows to the like numbered paragraphs of defendant's motion for a new trial.

I.

Plaintiffs deny that the evidence is insufficient to justify the Final Judgment entered herein including findings 3, 4, 5 and 6.

II.

Plaintiffs deny that the Final Judgment entered herein, including findings 3, 4, 5 and 6, is contrary to the evidence.

III.

Plaintiffs deny that the Final Judgment entered herein is contrary to law or equity. All of defend-

ant's argument in its paragraph III was made in open court at the final hearing and in defendant's 63 page brief.

IV.

Plaintiffs deny that there were any irregularities in the proceedings of the Court or on the part of the plaintiffs, by which defendant was prevented from having a fair trial. The trial was not before a jury, and the Court did not improperly admit evidence, nor improperly overrule defendant's objections to admitting evidence, nor improperly deny defendant's motions on admitting evidence, nor give unfair weight or consideration to evidence. The Court's rulings were consistent with justice. The Court and plaintiffs committed no errors, but if any errors were made, they were harmless errors and under Rule 61 of the Rules of Civil Procedure are not a ground for granting a new trial. Defendant's arguments were previously presented at the trial, at the final hearing and in its brief and present nothing new.

V.

Plaintiffs deny that any recitals, including paragraphs 7 and 8 in the Final Judgment herein are unnecessary or mischievous, or contrary to the evidence. Defendants again are reiterating matters previously argued.

VI.

Plaintiffs deny that Conclusions 9 through 12 of the Final Judgment herein are contrary to the evidence, the law, or principles of equity.

VII.

Plaintiffs deny that Conclusions 13 through 14 of the Final Judgment herein are contrary to the evidence, the law or principles of equity.

VIII.

Plaintiffs deny that paragraph 15 of the Final Judgment herein is erroneous or would unconstitutionally deprive defendant of property and require delivery of same without consideration and due process of law.

IX.

Plaintiffs deny that the Final Judgments herein is erroneous in dismissing defendant's cross complaint.

X.

Plaintiffs deny that the Final Judgment herein is erroneous in imposing costs on defendant.

Plaintiffs state that the Final Judgment entered herein sufficiently and properly set forth the ultimate facts, conclusions of law and decree based upon the proceedings at the trial which lasted three days in open court, on the final arguments of counsel, and on the briefs filed by counsel for both parties herein. Plaintiffs further state that all of defendant's arguments in its motion for new trial have been previously argued, considered and properly ruled upon by the Court and disposed of by the Final Judgment. Wherefore plaintiffs submit that any further presentation by defendant should

be by way of appeal and that the motion for new trial, being without basis, should be denied.

/s/ JAMES R. McKNIGHT,
/s/ ROBERT C. COMSTOCK,
/s/ WILLIAM G. MacKAY,
Attorneys for Plaintiffs

[Endorsed]: Filed April 7, 1952.

In the United States District Court, Northern District of California, Southern Division

Civil Action No. 29,739

JAMES L. YOUNGHUSBAND and HOWARD YOUNGHUSBAND, co-partners, doing business as Consolidated Cosmetics, and Les Parfums de Dana, Inc.,

Plaintiffs,

vs.

ROLLEY, INC.,

Defendant.

ORDER

This cause coming to be heard on defendant's motion for a new trial, and the court being fully advised in the premises, it is hereby ordered that:

The defendant's motion is denied.

/s/ MICHAEL J. ROCHE,
United States District Judge.

Dated April 15th, 1952.

[Endorsed]: Filed April 15, 1952.

[Title of District Court and Cause.]

WRIT OF INJUNCTION

To Rolley, Inc., a California corporation of San Francisco, California, and to your agents, officers, servants, employees, and attorneys, and all persons in active concert or participation of privity with you and to each and every one of you, Greeting:

Whereas, it has been represented to the Honorable Michael J. Roche, Judge of the District Court of the Northern District of California, Southern Division, on the part of James L. Younghusband and Howard Younghusband, co-partners doing business as Consolidated Cosmetics and Les Parfums de Dana, Inc., a New York corporation, complainants in their certain complaint, exhibited in said District Court, before said Judge of said Court, against you, the said Rolley, Inc., to be relieved touching the matters complained of. In which said complaint it is stated, among other things, that your actings and doings in the premise are contrary to equity and good conscience. And it being ordered that a writ of Permanent Injunction issue out of said Court, upon said complaint, enjoining and restraining you, and each of you, as prayed for in said complaint; We, therefore, in consideration thereof, and of the particular matters in said complaint set forth, do strictly command you, the said Rolley, Inc., and each and every one of you, that you be hereby forever enjoined and restrained from in any way directly or indirectly,

(a) infringing plaintiff's registered trade mark

Voodoo by using Voodoo or any other trade mark confusingly similar thereto on or in connection with perfumes, colognes, cosmetics, or any other goods or services on or in connection with which such use is likely to cause confusion or mistake or to deceive purchasers as to the source of origin of such goods or services;

(b) selling, offering for sale or advertising perfume, cologne, or other goods of the same descriptive properties bearing the trade mark Voodoo;

(c) making any use of Voodoo orally or in writing, except in connection with the original sealed retail packages of the plaintiffs as placed on the market by the plaintiffs;

(d) filling any orders calling for or requesting Voodoo cologne, or other goods of the same descriptive properties except with the products originating with plaintiffs and contained in the complete unopened original sealed retail packages of the plaintiffs as placed on the market by the plaintiffs;

(e) preparing any list including the trade mark Voodoo or offering, presenting, giving, mailing, sending publishing or circulating such list to anyone;

(f) adding or threatening to add, or prosecuting in the cross-complaint in this case any of plaintiff's customers or from bringing any further suit against plaintiff's customers or prospective customers which tenders as an issue therein the right of the

plaintiffs to manufacture or of such customers to purchase, advertise or sell in any lawful manner the plaintiffs' Voodoo perfume, cologne or other cosmetics.

You are hereby ordered and directed to deliver up to plaintiffs' attorneys, all labels, signs, prints, advertising leaflets, catalogs, price lists, packages, wrappers, receptacles, and other things, and all plates, molds, and other devices for making the same, in the possession or under the control of the defendant, which unlawfully bear the designation Voodoo.

Hereof fail not, under the penalty of what the law directs.

To the Marshal of the Northern District of California, Southern Division, to execute, and return in due form of law.

Witness, The Hon. Michael J. Roche, Judge of the Northern District of California, Southern Division, at San Francisco, California, this 15th day of April, in the year of our Lord one thousand nine hundred and fifty-two, and of the Independence of the United States of America, the year.

[Seal] /s/ C. W. CALBREATH,
Clerk

/s/ By MARGARET P. BLAIR,
Deputy

Return on Service of Writ attached.

[Endorsed]: Filed April 21, 1952.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the Above Entitled Court:

To the Plaintiffs and Cross-Defendants James L. Younghusband and Howard Younghusband, and to William G. MacKay, Esq., and McKnight and Comstock, Their Attorneys:

You, and Each of You, Will Please Take Notice that defendant and cross-complainant Rolley, Inc., intends to, and it does hereby, appeal to the United States Court of Appeals for the Ninth Judicial Circuit from the judgment made and entered in the above entitled Court on the 24th day of March, 1952, in favor of plaintiffs and cross-defendants in said action and against defendant and cross-complainant therein, and from the order denying motion for new trial made and entered in the above entitled Court on the 15th day of April, 1952, and from the whole thereof.

Dated this 28th day of April, 1952.

HARRY GOTTESFELD,
JOSEPH A. BROWN,
HUTCHINSON & QUATTRIN,
/s/ By J. ALBERT HUTCHINSON,
Attorneys for Defendant and Cross-Complainant

Acknowledgment of Service attached.

[Endorsed]: Filed April 28, 1952.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in the above-entitled case and that they constitute the record on appeal as designated by the attorneys herein:

Complaint for injunction, etc.

Motion for leave to file cross-complaint and bring in additional parties and order allowing.

Answer and cross-complaint.

Motion to vacate order permitting defendant to bring in additional parties and to strike portions of cross-complaint.

Motion for preliminary injunction.

Order vacating order of June 7, 1950, and denying motion to strike in part.

Order granting preliminary injunction.

Answer to cross-complaint.

Order amending order for injunction.

Undertaking on injunction.

Writ of injunction.

Motion to add party plaintiff.

Stipulation for addition of party plaintiff.

Order adding party plaintiff, etc.

Plaintiffs' request for admissions under Rule 36.

Reply to request for admissions under Rule 36.

Findings of Fact, Conclusions of Law, and Final Decree.

Motion for a new trial.

Plaintiffs' response to defendant's motion for new trial.

Order denying motion for new trial.

Writ of injunction.

Notice of Appeal.

Request for transcript of record on appeal.

Appellees' designation of additional records on appeal.

Resporter's transcript, November 14, 15, 16, 1951.

Reporter's transcript, April 11, 1952.

Plaintiffs' Exhibits 1 to 101.

Defendant's Exhibits A to Z, A-1 to J-1.

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 20th day of May, 1952.

[Seal] C. W. CALBREATH,
Clerk

In the District Court of the United States for the Northern District of California, Southern Division

No. 29,739

JAMES L. YOUNGHUSBAND and HOWARD YOUNGHUSBAND, co-partners, doing business as CONSOLIDATED COSMETICS, and LES PARFUMS de DANA, INC.,

Plaintiffs,

vs.

ROLLEY, INC.,

Defendant.

REPORTER'S TRANSCRIPT

Proceedings of November 14, 15 and 16, 1951

Before: Hon. Michael J. Roche, Judge.

Appearances: For the Plaintiffs: McKnight and Comstock by James R. McKnight, Esq., William G. MacKay, Esq. For the Defendant: J. Albert Hutchinson, Esq., and Harry Gottesfeld, Esq. [1*]

Mr. McKnight: Your Honor, please, this is a trademark infringement case involving really four trademarks, the most important of which are the trademarks "Voodoo" and "Tabu" for perfume. The plaintiff, James L. Younghusband and Howard Younghusband, are partners forming the firm of Consolidated Cosmetics, a Chicago firm that distributes these perfumes. The defendant, Rolley,

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* Page numbering appearing at bottom of page of original Reporter's Transcript of Record.

Inc., is a California Corporation, and we allege is selling perfumes bearing trademarks which are infringements of the trademarks we own. [2]

One of the trademarks that the defendant, Rolley, Inc., is using is the trademark "Voodoo" on perfume which is identical with the trademark "Voodoo" of the plaintiff. The other trademark, "Forbidden Flame," we allege is an infringement of the trademark "Forbidden," which is also owned by the plaintiff.

The plaintiff owns three trademarks which are very closely related in meaning. One is the word "Tabu," spelled T-a-b-u, and "Taboo," spelled T-a-b-o-o, and the trademark "Forbidden," all of which mean the same thing. The trademark "Tabu" also has heavy advertising in which the expression "Tabu, the forbidden perfume," is used. The defendant, we allege, has infringed these trademarks by the selling of the "Forbidden Flame" perfume, which, by the way, was put out as a reproduction.

The plaintiff will show that it has registrations of these trademarks in the United States Patent Office. These registrations are set forth in the complaint. The registration of "Tabu—T-a-b-u" goes back to 1934. The registration of "Voodoo" goes back to January 3, 1939. The defendant's answer includes a counter claim or a counter complaint alleging that they have prior use of the trademark "Voodoo" and therefore that the plaintiff is infringing their trademark rights, which are solely common law rights.

In the answer the date set forth for the defendant's claim [3] of use of Voodoo is April 15, 1940, which is later than the registration date of the plaintiff's Voodoo, which is January 3, 1939. So we have an instance of where the counter claim is apparently improper and should be dismissed on its face.

As your Honor knows, there has been a new Trademark Act passed and is now in effect, called the Act of 1946, or the Lanham Act. That Lanham Act, or Act of 1946, succeeded the Act of 1905 under which trademarks were registered in the United States Patent Office. All of plaintiff's registrations have been reaffirmed or re-registered under the Lanham Act, so that we are now entitled to all the provisions of this new Trademark Act. I say that because in some instances the protection afforded by the Act of 1946 is believed to be greater than that given plaintiffs under the Act of 1905.

The Court: Does the substantive Act of 1946 embody the substantive law of 1905?

Mr. McKnight: Partially. Largely.

The Court: What is the difference, if any?

Mr. McKnight: I think in some instances infringement can be found where the mark is used not on the goods, but in connection with the sale of the goods, advertising over the radio, or where there has been a standard on a counter, let's say, in the City of Paris someone left a standard—that isn't pertinent to this case, but let's say there is a standard there with the word Voodoo on it, that would be [4] considered an infringement under the

Lanham Act, whereas it might not be considered a case of trademark infringement under the Act of 1905. In those days it was considered unfair competition rather than technical trademark infringement. But I think this case is one of technical trademark infringement because of the registrations involved, although there is some feature of unfair competition, too.

Title to the trademarks is set forth in the complaint and established in the plaintiff's proof. I won't go into detail except to say that when I read the deposition it will show title to the registrations.

Now, on the parties to this suit, a new party has been made to this suit, Les Parfums de Dana, Associated, with Consolidated Cosmetics. Title to the trademark Voodoo at the present time is in the name of Les Parfum de Dana, but under the Act which is pertinent relating to the consideration of the matter of use there is inter relationship.

Plaintiff's perfumes and cosmetics are sold all over the United States. They are sold in such famous stores as the City of Paris, Emporium, I. Magnin's, Roos Brothers, Rafael Weil, Macey's, Hale Brothers, H. Liebes & Company, J. Magnin's, White House, and all Owl Drug Stores in San Francisco.

In Oakland our customers include H. C. Capwell, Sullivan & Furth, I. Magnin, J. Magnin, Kuhn's, and many others. In Los Angeles, Robinson's, Bullock's, Magnin's, [5] the Broadway, the May Company, Owl Drug, Whelan Stores, Eastern Columbia, Haggerty's, and Sak's Fifth Avenue. The plain-

tiff's Voodoo and Forbidden perfumes are sold throughout the United States in practically every store and every drug store and every department store in the country. The sales of these perfumes has exceeded $32,000,000. We feel there is hardly a woman in the United States who has not heard of these perfumes. In addition, the plaintiff has had national distribution and advertised the perfumes in such national magazines as Harper's Bazaar, Town & Country, Vogue, and practically every metropolitan newspaper in the United States. Many of those advertisements will be offered in evidence, had been taken in the depositions, and established substantially $3,000,000 have been spent in advertising plaintiff's trademark products.

As we have said before the registrations will be offered in evidence, and we feel that the registrations are prima facie evidence of title and ownership.

The defendant and its predecessor, Charles A. Rolley, President of Rolley Products, Inc., admit in a discovery deposition that reproductions has been put out by Rolley and were intended to be copies of well known perfumes. In Exhibit 1 there are some 29 reproductions of perfumes, in which such famous names as Mandalay, which belonged to Powers; Ballet, belonging to Hudnut; "Wicked," belonging to Peggy Sage; Curtain Call, belonging to Marie; Forbidden, belonging [6] to the plaintiff; White Christmas, belonging to Caron, and Claire de Lune, belonging to Colgate. All of these were copies of famous perfumes and famous perfume

names. Coty even stopped Rolley in one instance from copying the Coty name.

Rolley has admitted a trademark is an important adjunct in the selling of perfume. To women the trademark is what they go by in buying perfume, especially in repeated orders and in telling others. And it is important to note the defendant admits that it has done itself no advertising of Voodoo or its perfumes. It merely sells perfume from one place. It has made some sales in interstate commerce, but these sales have been largely from a store here on Geary Street in San Francisco. Naturally the defendant doesn't need to do any advertising of Voodoo, when he can ride on the coat tails of the plaintiff.

In the event the defendant claims to have prior use, even though it is pleaded later than plaintiff's registration, we say that that proof should be by the preponderance. The authorities so state, and I have a short trial brief to hand to your Honor, which has some of the basic authorities. Where it puts the burden of proof is on the junior party and all doubts must be resolved against him.

Another interesting thing is that in Mr. Rolley's discovery deposition he was asked: [7]

"Q. So that all the information you have is oral, only from your memory in regard to those early sales of Voodoo? "A. That's right.

"Q. You don't have any written documents on the subject at all? "A. No.

"Q. Do you have any record of sales?

"A. No.

"Q. Do you have any ledger?

"A. Not that far back, no; I wouldn't keep my books after so many years."

We feel, under those circumstances, defendant's defense and defendant's counter claim is fallacious and should be dismissed.

The plaintiff's trademarks have been adjudicated by many courts, and we have quoted some of them, some of the adjudications.

We feel under the circumstances the proof will show that the plaintiff has established its trademark rights, and that the defendant has infringed, and the plaintiff is entitled to a decree. I have made these opening remarks rather brief because I feel it will be repeated largely in the trial and the depositions.

Mr. Hutchinson: If the Court please, I think it would [8] be helpful to have brief statement from the defendant and cross complainant, Rolley, Inc.

As counsel has indicated that is a California corporation, incorporated in 1946, when it took over the business of Mr. Charles A. Rolley, who is also president of that company. Mr. Rolley entered the perfume business in 1933. It was a side business to another activity he had at that time, as the evidence will indicate, and it grew through the years. He was engaged in selling perfumes and in the use of many names including Voodoo.

Counsel has suggested that there is involved here some issue as to Tabu and some variants, and Forbidden. That is not the case. The cross complainant and defendant makes no claim to Tabu

as a trademark or name for perfume, and has not at any time during the cse, and has not at any time sold any perfume whatever under the name Tabu or any of its variants.

The use of Forbidden Flame was made by Mr. Rolley prior to the incorporation of this company, so it has not been used for many years, long since the statute of limitations, assuming it did infringe, which we believe it does not. In other words, Forbidden Flame on a perfume is as much different from Tabu, described as a forbidden property, as any other trademark. However, we call attention to the fact it has not been used in many years by anybody connected with the cross complainant, [9] and it is not in issue, and merely clutters the record to drag it in.

The cross complaint, I believe, shows a use in 1940. The proof of the cross defendant will show a use of Voodoo as early as 1934, and I think I should advise the Court we will desire to amend the complaint—cross-complaint as made to make that change, because that will be our proof.

The comments of counsel were quite interesting to us in one respect. He did not indicate when, if ever, Voodoo was sold under that name in the West. And, if sold, when it was first so sold. I think it so well known as to be known to all lawyers that trademark registration means nothing unless there is a use, and if there is a prior use, then the registration is immaterial, and must in fact be cancelled by the prior user.

Rolley, Inc., and predecessor, Mr. Charles A.

Rolley, did not do a great deal of business any place else. Most of their business has been confined to the three Pacific Coast States of Washington, Oregon and California, the Hawaiian Islands, and to some extent the surrounding states of Nevada and Arizona. They have also done business in Washington, D. C., throughout the last several years.

Voodoo has not been registered, or any attempt to register it on behalf of cross complainant, but we will show use has been made of that name in conjunction with that perfume since 1934. Therefore, in the absence of any proof or [10] suggestion of proof on the part of the plaintiff here, it is quite obvious there isn't the suggestion of a case. Since the parties are here, and these are eastern firms, and it is desirable to use the cross complainant to have this matter settled we do not, however, move for non-suit; but we do call attention to the fact that have not suggested one thing that would give them right to any relief, namely, a prior use. They only claim registration in 1939. Registration would mean nothing unless there was a connecting use. And even then, defendant alleged in the cross complaint 1940, there is no suggestion they had used that name in conjunction with perfume within the area that the cross complainant was doing business even at that time.

I think that will give the Court an idea of our proof. We, of course, seek an injunction against their using a right which has been appropriated by the cross complainant on the name Voodoo. No claim is made to the others, and I think when the

time comes our objection to any offer of proof on those would be sustained.

The Court: What was your suggestion as to amendment?

Mr. Hutchinson: I would like to substitute in the cross complaint, wherever there is reference to the use of the name Voodoo in combination with perfume sales in the area therein described by the cross complaint, Rolley, Inc., and its predecessor in interest, Mr. Charles A. Rolley, the figure [11] 1934 be substituted for 1940.

The Court: Any objection?

Mr. McKnight: Yes, I do, because I don't think there is any basis for it. The amendment should have been made long ago instead of waiting for the day of trial. Even when the discovery depositions were taken, they showed 1938 as the earliest use.

This comes under the heading of surprise, unfair approach to the matter. I cannot believe they can produce any proof of 1934 in view of what took place at the discovery depositions which I am going to read, your Honor.

Mr. Hutchinson: If the Court please, the deposition referred to indicates 1938, which is much earlier than 1940, and they have been aware of that reference from the President of the plaintiff corporation, Mr. Rolley, for over a year. I think that is 1950.

Mr. McKnight: That is right.

Mr. Hutchinson: There is no surprise. We do, however, wish the Court to understand if they are in need of further evidence, if they require further

deposition we will be very pleased to stipulate in order that there be no disadvantage to them. However, the facts are the facts, and I think we have a right——

Mr. McKnight: (Interposing) I will accept that offer that we have a right to take further depositions on [12] anything beyond the pleadings, based on what might come up today of any claim of Voodoo prior to the date alleged in the answer and counter claim.

Mr. Hutchinson: My client, or Mr. Rolley, who is President of my client, advises me I am incorrectly informing the Court. The deposition said 1934, and that is more than a year ago, and it was a discovery at their request.

The Court: You may proceed. Have you any stipulations you can enter into in the interests of time, gentlemen, for the purpose of the record?

* * * * * [13]

"JOHN GAUMER

a witness called and examined by the plaintiff, being first duly cautioned and sworn by the Notary Public to tell the truth, the whole truth, and nothing but the truth, testified as follows: [14]

"Direct Examination

"By Mr. McKnight:

"Q1. Will you please state your name?

"A. John Gaumer.

"Q2. What is your address?

"A. My office is at 30 West Hubbard Street,

Chicago Illinois; my home address is 5556 South Mozart Street, Chicago 29, Illinois.

"Q3. What is your business?

"A. Cosmetics.

"Q4. At the time that the complaint was filed in this case by whom were you employed?

"A. I was employed by Consolidated Cosmetics and Dana Perfumes, Inc.

"Q5. What position do you now hold?

"A. I am manager at Consolidated Cosmetics.

"Q6. What are your duties?

"A. General executive duties. I am also in charge of the Legal Department, including supervision of trademark and patent work.

"Q7. Is that the same Consolidated Cosmetics that is the plaintiff in this case?

"A. Yes, it is.

"Q8. What is the legal form of Consolidated Cosmetics?

"A. It is a copartnership composed of James L. Younghusband and Howard Younghusband. [15]

"Q9. Is Consolidated Cosmetics the owner of any trademarks?

"A. Oh, yes. It is the owner of quite a number of trademarks.

"Q10. Will you give me some of the principal trademarks that are owned by the plaintiff in this case?

"A. Tabu, Taboo, Forbidden and Voodoo.

"Q11. Did Consolidated Cosmetics own the trademark Voodoo and registrations therefor at the time of the filing of the complaint in this case?

"A. Yes, and owned it prior to that date.

"Q12. Who owns the trademark Voodoo and registration therefor now?

"A. Les Parfums de Dana, Inc.

"K13. What is the legal form of Les Parfums de Dana, Inc.?

"A. It is a corporation chartered under the laws of the State of New York.

"Q14. Is that the same Les Parfums de Dana, Inc., that is now plaintiff in this case?

"A. Yes, it is.

"Q15. Are the trademarks Tabu, Taboo, Forbidden and Voodoo registered in the United States Patent Office? "A. Yes, they are.

"Q16. On what goods is the trademark Tabu used?

"A. On perfumes, colognes, face powders, lipsticks, [16] sachets, bath oil, soap and other toilet preparations.

"Q17. On what goods are the trademarks Taboo, Forbidden and Voodoo used?

"A. Substantially the same goods on which Tabu is used except sachets and bath oil.

"Q18. I will show you a document marked for identification Plaintiff's Exhibit 2 and ask you if you can identify this document?"

Mr. McKnight: Should I pass these exhibits up to your Honor as we go along? A great deal of this is highly technical. Maybe I had better hand them up to your Honor so you can go through them as we proceed.

Mr. Hutchinson: Counsel, do you have a copy

of that? We don't seem to have a copy of the deposition. I thought we might follow the reading. Thank you.

Mr. McKnight: (Continuing reading).

"A. Yes. This is a soft copy of a registration 314,493, issued by the United States Patent Office July 3, 1934, on the trademark Tabu, registered to James L. Younghusband and republished under the Act of 1946, on March 9, 1948, by Consolidated Cosmetics, one of the plaintiffs in this case."

Mr. McKnight: Your Honor, at this time I would like to substitute as Exhibit 2 a certified copy for the soft copy that was offered in evidence. Is that satisfactory? Subject to [17] correction if error should appear.

Mr. Hutchinson: Yes. With the exception that this relates, your Honor, to Tabu and we object on the ground it is incompetent, irrelevant and immaterial and without any issue in this case.

Mr. McKnight: In other words, he is objecting on the merits, which will have to be later determined after your Honor hears the evidence in the case. I merely want to substitute a certified copy for the soft copy.

Mr. Hutchinson: No objection on that ground, your Honor.

The Court: Let it be admitted and marked.

Mr. McKnight: May I asked this be marked Exhibit 2? I desire to offer No. 2 before No. 1, because Exhibit No. 1 is the only exhibit that will appear in the discovery deposition which I will read immediately following this deposition.

(Certified copy of Registration No. 314,493 was received in evidence as Plaintiff's Exhibit 2.)

Mr. McKnight: (Continuing reading).

"Q19. I show you a paper marked for identification Plaintiff's Exhibit 3 and ask you if you can identify this document.

"A. Yes, I can. It is a soft copy of registration number 407,797, issued by the United States Patent Office June 27, 1944, on the trademark Tabu, registered to [18] Associated Distributors, then a copartnership composed of James L. Younghusband, Howard Younghusband, Paul Rowatt and Walter A. Jordan, and republished under the Act of 1946, on June 14, 1949, by Consolidated Cosmetics, one of the plaintiffs in this case."

Mr. McKnight: I also at this time would like to offer in evidence as Plaintiff's Exhibit 3, certified copy of registration 407,797, subject to the same objection.

The Court: Let it be admitted and marked.

The Clerk: Plaintiff's Exhibit 3 admitted and filed in evidence.

(Certified copy of registration 407,797 was received in evidence and marked Plaintiff's Exhibit 3.)

Mr. McKnight: (Continuing reading).

"Q20. I show you a paper marked for identification Plaintiff's Exhibit 4, and ask you if you can identify this document?

"A. Yes, I can. This is a soft copy of registra-

tion No. 426,323, issued by the United States Patent Office on December 24, 1946, on the trademark Tabu, issued to Consolidated Cosmetics, a predecessor of one of the plaintiffs in this case and republished by Consolidated Cosmetics under the Act of 1946, on June 14, 1949, one of the plaintiffs in this case."

Mr. McKnight: I now would like to offer a certified copy [19] in place of the soft copy of Registration No. 426,323, subject to the same objection.

Mr. Hutchinson: Can it be understood all these references to Tabu and Forbidden in the various exhibits will be offered by you, no objection made to the foundation, reserving the right for cross plaintiff's objection on competency and the issues point earlier made, and that will be to all of these?

Mr. McKnight: That may be understood without repetition.

The Court: Let the record so show.

The Clerk: Plaintiff's Exhibit 4 admitted and filed in evidence.

> (Certified copy of Registration No. 426,323 was received in evidence and marked Plaintiff's Exhibit 4.)

Mr. McKnight: (Continuing reading).

"Q21. I show you another document, marked for identification Plaintiff's Exhibit 5, and ask you if you can identify this document?

"A. Yes. This is a soft copy of registration number 343,897, issued by the U. S. Patent Office

March 9, 1937, covering the trademark Taboo, issued to Associated Distributors, Inc., one of the predecessors of Consolidated Cosmetics, which is one of the plaintiffs in this case and republished under the Act of 1946 by Consolidated [20] Cosmetics, one of the plaintiffs in this case, on March 16, 1948."

Mr. McKnight: May I offer this certified copy of Registration No. 343,897, in evidence in place of the soft copy?

The Court: It may be admitted and marked.

The Clerk: Plaintiff's Exhibit 5 admitted and filed in evidence.

(Certified copy of Registration No. 343,897 was received in evidence and marked Plaintiff's Exhibit 5.)

Mr. McKnight: (Continuing reading).

"Q22. I show you a paper marked for identification Plaintiff's Exhibit 6 and ask you if you can identify this document?

"A. Yes, I can. It is a soft copy of registration 437,162, issued by the United States Patent Office March 9, 1948, one the trademark Taboo, issued to Consolidated Cosmetics, one of the predecessors of Consolidated Cosmetics, and plaintiff in this case, and republished under the Act of 1946 on June 14, 1949, by Consolidated Cosmetics, one of the plaintiffs in this case."

Mr. McKnight: Your Honor, I would like to substitute and offer in evidence as Plaintiff's Exhibit 6, a certified copy of Registration 437,162.

The Court: Let it be admitted and marked. [21]

The Clerk: Plaintiff's Exhibit 6 admitted and filed in evidence.

> (Certified copy of Registration No. 437,162 was received in evidence and marked Plaintiff's Exhibit 6.)

Mr. McKnight: (Continuing reading).

"Q23. I call you attention to a paper marked for identification Plaintiff's Exhibit 7, and ask you if you can identify this document?

"A. Yes. It is a soft copy of Registration 408-529, issued by the United States Patent Office August 15, 1944, covering the trademark Forbidden, issued to Associated Distributors, Inc., one of the predecessors of Consolidated Cosmetics, which is one of the plaintiffs in this case. It was republished under the Act of 1946, on June 14, 1949, by Consolidated Cosmetics, one of the plaintiffs in this case."

Mr. McKnight: Your Honor, I would like to offer in evidence a certified copy of Registration No. 408,529 in lieu of the soft copy, as Plaintiff's Exhibit 7.

The Court: Plaintiff's Exhibit 7 admitted and filed in evidence.

> (Certified copy of Registration No. 408,529 was received in evidence and marked Plaintiff's Exhibit 7.)

Mr. McKnight: (Continuing reading).

"Q24. I show you a document marked for iden-

tification [22] Plaintiff's Exhibit 8, and ask you if you can identify it.

"A. Yes. This is a soft copy of registration 363,746, issued by the United States Patent Office January 3, 1939, covering the trademark Voodoo, issued to Associated Distributors, Inc., one of the predecessors of Consolidated Cosmetics, which is one of the plaintiffs in this case and republished by Consolidated Cosmetics under the Act of 1946, on August 9, 1949."

Mr. McKnight: I would like at this time to offer in evidence certified copy of Registration No. 363,746, in lieu of the soft copy referred to in the deposition.

The Court: This is Voodoo?

Mr. McKnight: Yes.

Mr. Hutchinson: Same objection on that, your Honor, with this further qualification, that the registration without use does not prove any issue in the case, and would not sustain judgment for the plaintiff.

The Court: I don't follow that clearly.

Mr. Hutchinson: This is with relation to Voodoo and registration for Voodoo. We do not challenge they have the certificate here, and do not raise any objection as to the foundation, but we think it is incompetent, irrelevant and immaterial, because it does not establish the issues, which is prior use or, for that matter, any use. [23]

The Court: Let's pause for a moment and proceed with prior use. How can we reach it, assuming you are correct?

Mr. Hutchinson: The right to a trademark of this nature depends on the use of the——

The Court: I understand that. How am I to determine at this time, whether there was a use or non-use?

Mr. Hutchinson: That is true. I realize the evidence must come in piece by piece, but I would like to have that reservation reserved, if I may.

The Court: Very well, same objection will run to this.

Mr. Hutchinson: Yes. Thank you.

The Court: Let the record so show.

Mr. Hutchinson: Thank you, your Honor.

The Clerk: Plaintiff's Exhibit 8 admitted and filed in evidence.

> (Certified copy of Registration No. 363,746 was received in evidence and marked Plaintiff's Exhibit 8.)

Mr. McKnight: (Continuing reading).

"Q25. Where did you obtain Plaintiff's Exhibits 2 to 8, both inclusive?

"A. From the United States Patent Office. They are official copies which are referred to as soft copies.

"Q26. Now, I call your attention to Plaintiff's Exhibit 2, and ask you who was the original registrant under [24] trademark Tabu?

"A. James L. Younghusband.

"Q27. Is that the same James L. Younghusband who is now one of the partners of Consolidated Cosmetics, the plaintiff in this case?

"A. Yes, the same person.

"Q28. Did James L. Younghusband use the trademark Tabu on cosmetics in 1934?

"A. He did. He used it on lipstick and rouge in 1934."

The Court: We will take a recess.

(Short recess.)

Mr. McKnight: (Continuing reading).

"Q29. Now, I show you another document marked for identification Plaintiff's Exhibit 9, and ask you if you can identify the signature thereon?

"A. Oh, yes. This is the signature of James L. Younghusband, which I have seen him sign literally thousands of times and I have no doubt about it.

"Q30. What trademark registration was covered by the assignment in Plaintiff's Exhibit 9 for identification?

"A. The trademark Tabu, registered in the United States Patent Office July 3, 1934, under number 314,493.

"Q31. And to whom did James L. Younghusband assign [25] Tabu in said registration?

"A. To Tattoo, Inc., an Illinois corporation.

"Q32. Now, I show you a document marked for identification Plaintiff's Exhibit 10 and ask you if you can identify the signature of the person who signed these papers?

"A. Yes, I can. It is the signature of C. C. Minogue.

"Q33. What are these documents in Plaintiff's Exhibit 10?

"A. They are affidavits filed in the United States Patent Office showing the merger of Tattoo, Inc., with several other corporations to form Associated Distributors, Inc.

"Q34. Were any trademarks involved in this case referred to in this merger?

"A. Yes. The trademark Tabu and registration 314,493 passed by virtue of this merger from Tattoo, Inc., to Associated Distributors, Inc.

"Q35. I call you attention to a document marked for identification Plaintiff's Exhibit 11, and ask you if you can identify the signature thereon.

"A. Yes. This is the signature of J. L. Younghusband.

"Q36. Is that the same J. L. Younghusband who is one of the partners of Consolidated Cosmetics, one of the plaintiffs in this case?

"A. Yes, the same person.

"Q37. Did any trademarks pass by virtue of that [26] assignment, Plaintiff's Exhibit 11?

"A. Yes, quite a number of trademarks, among which are Tabu registration 314,493, the trademark Taboo, registration 343,897, and the trademark Voodoo, registration 363,746.

"Q38. From whom to whom were these trademarks and registrations assigned by this document?

"A. From Associated Distributors, Inc., an Illinois corporation, and one of the predecessors of the plaintiff in this case to James L. Younghusband.

"Q39. Is that the same James L. Younghusband who is one of the partners in Consolidated Cosmetics, one of the plaintiffs in this case?

"A. Yes, sir.

"Q40. I call you attention to Plaintiff's Exhibit 12, and ask you if you can identify the signature thereon?

"A. Yes, I can. That is the signature of James L. Younghusband.

"Q41. Did this document pass title to any trademarks and registrations involved in this suit?

"A. Yes, it did. Passed title to quite a number of trademarks from James L. Younghusband to Associated Distributors, a partnership composed of James L. Younghusband, Howard Younghusband and Paul Rowatt, and covers many trademarks, among which are Tabu 314,493, and Taboo, [27] number 343,897, and Voodoo, number 363,746."

Mr. Hutchinson: Excuse me, counsel. I have been able to read ahead to page 13, line 26, and I think there is no use of your reading that. That may be deemed read and the exhibits therein referred to in the deposition be deemed to have been offered under our standing understanding, to save time.

Mr. McKnight: That is from the rest of page 10, page 11, page 12, and page 13 of the deposition?

Mr. Hutchinson: Yes.

Mr. McKnight: Thank you. May I ask that the reporter copy that into the record.

The Court: Let the record so show, Mr. Reporter.

(Pursuant to the foregoing stipulation, the following portion of the deposition of John Gaumer was deemed read:)

"Q42. I call your attention to a document marked for identification Plaintiff's Exhibit 13, and ask you if you can identify the signature thereon.

"A. Yes. This is the signature of J. L. Younghusband.

"Q43. Is that the same J. L. Younghusband who is one of the partners of Consolidated Cosmetics, one of the plaintiffs in this case? "A. Yes.

"Q44. Did that document pass title to any trademarks involved in this proceeding? [28]

"A. Yes. It passed title to a number of trademarks, among which are Tabu, registration 314,493; Taboo, registration 343,897; and Voodoo, registration 363,746.

"Q45. From whom to whom?

"A. From Associated Distributors, composed of James L. Younghusband, Howard Younghusband and Paul Rowatt to Associated Distributors, a partnership, composed of James L. Younghusband, Howard Younghusband, Paul Rowatt and Walter A. Jordan.

"Q46. I call your attention to a document marked for identification Plaintiff's Exhibit 14, and ask you if you can identify the signature of the person signing the same?

"A. Yes. This is the signature of Paul Rowatt, who I know very well, and whose signature I know very well.

"Q47. Did that document pass title to any trademarks involved in this case?

"A. Yes. It did pass title to a number of trademarks, among which are Tabu, 314,493; Taboo, 343,-897; and Voodoo, 363,746, as well as the trademark

Tabu, 407,797 and the trademark Forbidden, serial number 467,868, which was then a pending registration in the United States Patent Office.

"Q48. From whom to whom did title pass by this document?

"A. Title passed from Associated Distributors, a [29] partnership composed of James L. Younghusband, Howard Younghusband, Paul Rowatt and Walter A. Jordan, to Consolidated Cosmetics, a partnership composed of James L. Younghusband, Howard Younghusband and Paul Rowatt.

"Q49. I call your attention to a document marked for identification Plaintiff's Exhibit 15, and ask you if you can identify the signature thereon.

"A. Yes. This is the signature of Paul Rowatt.

"Q50. Did title to any trademarks involved in this proceeding pass by that document?

"A. Yes. A number of trademarks are involved in this assignment, among which are the trademarks Tabu, registration number 314,493; Tabu, registration number 407,797; Tabu, registration number 426,323; Taboo, registration number 343,-897; and Taboo, registration number 437,162.

"Q51. From whom to whom did title pass by this document?

"A. This document transferred title from Consolidated Cosmetics, a partnership composed of James L. Younghusband, Howard Younghusband and Paul Rowatt, to Consolidated Cosmetics, a partnership composed of James L. Younghusband and

Howard Younghusband, one of the plaintiffs in this case.

"Q52. I show you a document marked for identification Plaintiff's Exhibit 16, and ask you if you can identify the signature thereon? [30]

"A. Yes, I can. It is the signature of Paul Rowatt.

"Q53. Did title to any trademark involved in this proceeding pass by that document?

"A. Yes. This is an assignment of a trademark from Consolidated Cosmetics, a partnership, composed of James L. Younghusband, Howard Younghusband and Paul Rowatt to Consolidated Cosmetics, a partnership composed of James L. Younghusband and Howard Younghusband, one of the plaintiffs in this case, and covers among other trademarks the trademarks Voodoo, registration number 363,746, and Forbidden, registration number 408,-529.

"Q54. I call your attention to a document marked for identification Plaintiff's Exhibit 17, and ask you if you can identify the signature thereon?

"A. Yes. Again this is the signature of James L. Younghusband.

"Q55. Is that the same James L. Younghusband who is a partner of Consolidated Cosmetics, one of the plaintiffs in this case?

"A. Yes, the same person.

"Q56. Did any trademarks involved in this proceeding pass by that document?

"A. Yes. The trademark Voodoo, registration number 363,746, was assigned from Consolidated

Cosmetics, a partnership, composed of James L. Younghusband and [31] Howard Younghusband to Les Parfums de Dana, Inc., a New York corporation."

Mr. McKnight: Beginning at the top of page 14——

The Clerk: Are you offering these into evidence here, counsel?

Mr. McKnight: I will at a later time.

Beginning at the top of page 14 of the deposition:

"Q57. Is this the same Les Parfus de Dana, Inc., that is one of the parties plaintiff in this case? "A. Yes, the same.

"Q58. Now, I ask you where you obtained Plaintiff's Exhibits 9 to 15, inclusive, and 17?

"A. They are certified copies of the original assignments. I obtained the certified copies from the United States Patent Office.

"Q59. Where did you obtain Plaintiff's Exhibit 16?

"A. That is an original document, the original assignment, which has been in my files, over which I have charge. I brought it from my files for this hearing.

"Q60. And were the trademarks Tabu, Taboo, Forbidden and Voodoo used on perfumes and various cosmetics by all of these holders of title of these various trademarks?

"A. Yes, continuously from the first sale under each of those trademarks.

"Q61. Where did these various businesses operate from during the last twelve years? [32]

"A. From 30 West Hubbard Street, Chicago 10, Illinois, and 430 North Michigan Avenue, previous to that time, and from 11 East Austin Avenue, as Hubbard Street was then known in Chicago. The plaintiff Les Parfums de Dana, Inc., has its main office at 16 West 60th Street, New York, New York.

"Q62. Since April of 1948 has Consolidated Cosmetics, the plaintiff in this case, used the trademarks Tabu, Taboo and Forbidden?

"A. Yes, and it also used the trademark Voodoo until it turned over the business to Les Parfums de Dana, Inc., the other plaintiff in this case.

"Q63. Where are Tabu and Voodoo perfumes and cosmetics of the plaintiffs in this case sold?

"A. In all of the principal department stores and drug stores and many beauty shops and specialty shops throughout the country.

"Q64. Can you name some of plaintiff's Tabu and Voodoo customers in San Francisco?

"Yes, I can. The following are among plaintiff's customers in San Francisco: City of Paris, The Emporium, I. Magnin, Roos Bros., Raphael-Weill, Macy's, Hale Bros., H. Liebes & Company, J. Magnin, The White House and Owl Drug Company, and many other stores. [33]

"Q65. Can you name any customers of Tabu and Voodoo perfumes and colognes in Oakland?

"A. Yes. The following are plaintiff's customers of said products in Oakland: H. C. Capwel, Sulli-

van & Furth, I. Magnin, J. Magnin, Kuhn's, and many other stores.

"Q66. Can you give the names of any of the stores in which plaintiff's Voodoo and Tabu perfumes and colognes are sold in Los Angeles?

"A. Yes. We sell to Robinson's, Bullock's, Magnin's, The Broadway, the May Company, Owl Drug, Whelan Stores, Eastern Columbia, Haggerty's, and Sax Fifth Avenue.

"Q67. Have the sales of plaintiff's Tabu and Voodoo perfumes and colognes been extensive on the West Coast?

"A. Yes, they have, and in all of the principal stores in California, Oregon and Washington.

"Q68. Are Tabu and Voodoo perfumes and colognes nationally sold by plaintiff?

"A. They are, from coast to coast, in every city in the Union and in every city in the United States.

"Q69. Have the sales of Taboo, Forbidden and Voodoo perfumes and colognes and cosmetics been extensive? "A. Yes, throughout the country.

"Q70. Can you give some idea of how extensive the [34] sale of Tabu, Forbidden and Voodoo perfumes and colognes have been to date?

"A. Yes. They amount to in excess of thirty-two million dollars in sales throughout the United States.

"Q71. What have the sales been to date on Voodoo perfumes and colognes?

"A. Approximately a quarter of a million dollars in sales.

"Q72. Can you produce representative packages

of the products sold by plaintiffs bearing the trade-marks Taboo, Forbidden and Voodoo?

"A. Yes, I can.

"Mr. McKnight: I will ask the reporter to mark the Tabu cologne Plaintiff's Exhibit 18, the Tabu cologne Plaintiff's Exhibit 19, the Taboo deodorant Plaintiff's Exhibit 20, the Forbidden perfume Plaintiff's Exhibit 21, the Voodoo cologne Plaintiff's Exhibit 22, and the Voodoo perfume Plaintiff's Exhibit 23.

"Q73. Where did you obtain Plaintiff's Exhibits 18 to 23, inclusive?

"A. Well, from the premises of the plaintiffs, that is, the stockroom on these perfumes.

"Q74. Are these the genuine products of the plaintiff?

"A. Yes, exactly as they are sold on the market and in the retail stores. [35]

"Q75. Have the Tabu perfumes and cosmetics of your company, Consolidated Cosmetics, and its predecessors, been extensively advertised?

"A. Yes, they have, to the extent of millions of dollars.

"Q76. In what kind of publications?

"A. In the principal elite publications of the country, such as Harper's Bazaar, Vogue, Town and Country and the New Yorker, and in practically all of the metropolitan newspapers in the United States.

Q77. Why were these mediums chosen?

"A. Because the line is rather a high-priced line and only those people who read such magazines

are likely to be our customers, although in the smaller sizes we reach people of moderate income; the national publications add to our prestige and the metropolitan newspapers reach everyone.

"Q78. Now, will you please produce some typical Tabu advertisements of the plaintiff, Consolidated Cosmetics, and its predecessors?

"A. Yes. Here are some typical Tabu advertisements.

"Mr. McKnight: I will ask the Reporter to mark these documents for identification as Plaintiff's Exhibits 24 to 41, inclusive. [36]

"Q79. I show you these advertisements, Plaintiff's Exhibits 24 to 41, and ask you where you obtained them?

"A. From the files at my office, over which I have supervision and control. These are copies of advertisements which appeared in publications and which I have retained for reference.

"Q80. I call you attention to names and dates at either the tops or bottoms of each of these advertisements, Plaintiff's Exhibits 24 to 41, what is the purposes of these names and dates?

"A. They show the publications and date of publication in which the advertisements appear.

"Q81. Did you personally see the advertisements Plaintiff's Exhibits 24 to 41 in the publications as they appeared on the market?

"A. Yes, at that time or shortly thereafter, in every one of them.

"Q82. And these advertisements as shown by Plaintiff's Exhibits 24 to 41, inclusive, were seen

by you in these publications at or about the date they bear? "A. That is right.

"Q83. And you personally know of your own knowledge? "A. I do. [37]

"Q84. How early do these advertisements of Tabu perfume go back to?

"A. September of 1941, when Plaintiff's Exhibit 39 appeared in Beauty Fashion, Harper's Bazaar, Town and Country, Vogue and You.

"Q85. Calling your attention to Plaintiff's Exhibits 24 to 41, inclusive, is the word Forbidden used in these advertisements in association with the trademark Tabu?

"A. Yes, consistently. You will notice down at the bottom of some place upon each of these advertisements the expression, 'The Forbidden Perfume.'

"Q86. What was the reason for the use of Forbidden?

"A. Forbidden and Tabu mean the same thing; they are synonyms. You might call forbidden a translation of tabu, although tabu has also become an English word.

"Q87. Are these advertisements, Plaintiff's Exhibits 24 to 41, all of the advertisements of Tabu perfume?

"A. By no means. There are hundreds and hundreds of advertisements. These are merely typical of some of the Tabu ads in national publications.

"Q88. Has there been any advertising of plaintiff's Voodoo perfume and cologne?

"A. Yes. They also have been extensively adver-

tised [38] in the magazines of metropolitan newspapers in the United States.

"Q89. Can you produce such advertising?

"A. I can. Here are a few of them.

"Mr. McKnight: I will ask the Reporter to mark these advertisements Plaintiff's Exhibits 42 to 84, inclusive.

"Q90. I call your attention to Plaintiff's Exhibits 42, 43 and 44 and ask you what kind of advertisements those are?

"A. These are magazine advertisements that appeared in Harper's Bazaar, Vogue, Beauty Fashion and The New Yorker.

"Q91. Can you identify those advertisements from your own knowledge?

"A. Yes. I have seen every one of them in the magazines at the time or shortly after they appeared.

"Q92. Now, I call your attention to documents marked for identification Plaintiff's Exhibits 45 to 48, inclusive, and ask you what kind of advertisements those are.

"A. Yes. This it mat material furnished by the plaintiff to its customers for the purpose of advertising Voodoo products in the metropolitan newspapers.

"Q93. Have you seen this material used in the metropolitan [39] newspapers?

"A. Yes, I have.

"Q94. Now, I want to call your attention to Plaintiff's Exhibits 49 to 84, inclusive, have you seen this material before? "A. Yes, sir.

"Q95. What are those?

"A. These are advertisements that were run by our customers in metropolitan newspapers in the nation, using mats furnished by us or their own material and in many cases our mats have been used with slight changes to conform with policies set by the various department stores.

"Q96. Can you identify these advertisements, Plaintiff's Exhibits 49 to 84 as advertisements referring to the Voodoo products of plaintiff?

"A. I can and I do.

"Q97. Have you seen them before?

"A. I have seen every one of them.

"Q98. Where did you get these Plaintiff's Exhibits 49 to 84?

"A. Out of my file over which I have control. I keep copies of all of these advertisements for reference purposes.

"Q99. How did you obtain them? [40]

"A. They were sent to us by the department stores at the time they requested payment for our participation in the cost of running those advertisements, and some of them I may have obtained directly from our salesmen, who make a habit of clipping such advertisements out of newspapers and sending them to us.

"Q100. You say that the stores sent in ads to claim a credit. What kind of ads are these?

"A. These are co-operative ads, in the cost of which the store and we participate.

"Q101. And in order to collect on this, they have to give proof of the publication?

"A. That is right.

"Q102. What has been the extent of advertising of plaintiff's products Tabu, Voodoo and Forbidden in the United States to date by the plaintiffs and their predecessors?

"A. Approximately $2,380,000.

"Q103. Has any of this advertising been done on the West Coast, including the States of California, Oregon, and Washington?

"A. Oh, yes, quite extensively in that territory. Of course, the national publications such as Vogue, Harper's Bazaar, Town and Country, all have wide circulation on the West Coast, including California, [41] but there have been hundreds of advertisements of plaintiff's perfumes and colognes in metropolitan newspapers in San Francisco, Oakland, Los Angeles, and other cities. For instance, Plaintiff's Exhibit 49 is for Voodoo perfume by the City of Paris, appearing in the San Francisco Examiner for December 21, 1950; Plaintiff's Exhibit 50 is a Voodoo advertisement appearing in Haggerty's store advertisement in the Los Angeles Times for December 11, 1950. Plaintiff's Exhibit 51 and 52 are large advertisements of Plaintiff's Voodoo perfume by Robinson's, one of the largest stores in Los Angeles. These ads appeared in the Los Angeles Times.

"Plaintiff's Exhibit 54 is an advertisement of Voodoo and Tabu perfume, appearing in Seattle, Washington.

"Plaintiff's Exhibits 56 and 57 are Voodoo ads in the Portland, Oregon, newspaper.

"Other advertisements are shown in this group of exhibits throughout the United States including the West Coast.

"Q104. What is the relationship between Consolidated Cosmetics, Les Parfums de Dana, Inc., and Dana Parfums, Inc.?

"A. They are all related companies and cooperate together in the production and sale of plaintiff's [42] trademark products involved in this case.

"Q105. Can you produce any of the invoices of the early sales of Voodoo cosmetics by plaintiff and its predecessors?

"A. I can. Here they are.

"Mr. McKnight: I will ask the Reporter to mark this group of documents Plaintiff's Exhibits 85, clipped together, having 48 pages, and ask you if you can tell me where you got these from?

"A. I got these from our files.

"Q106. Were they kept in the ordinary course of business?

"A. Yes, they were. I obtained them from the files of our office. They show the sales of some of the early Voodoo cosmetics by the plaintiff and its predecessors.

"Q107. From what date do these invoices begin?

"A. From May 30, 1944.

"Q108. Were there sales of Voodoo perfumes and other cosmetics prior to that date?

"A. Oh, yes, but I do not have any of the invoices since they have been long destroyed.

Q109. Why?

"A. We do not keep our records beyond that which is required by the Department of Internal Revenue. [43] Once they have approved our tax returns and these documents are five years old or later, we destroy them immediately.

"Q110. Do you know of your own knowledge that there were sales of Tabu, Taboo, Voodoo and Forbidden perfumes and other cosmetics prior to 1944 by the predecessors of Consolidated Cosmetics, the plaintiff in this case?

"A. Yes, I do. When I became employed by the predecessors of the plaintiffs in this case, November 18, 1940, I saw a large number of invoices covering goods under trademarks involved in this case long prior to November, 1940.

Q111. Did you notice any sales of Voodoo perfume and cologne on the premises at the time that you became employed by the plaintiff's predecessors?

"A. Yes. I recall them and other products, perfume, cologne, face powder and lipsticks.

"Q112. Did you see any invoices of the sale of these Voodoo products on the premises at the time you entered the employment of the plaintiff's predecessors? "A. Yes, I did.

"Q133. Were they sent to more than one place in the United States?

"A. Yes. I recall that there had been sales [44] to Texas, California, Ohio and New York and many other places.

"Q114. Calling your attention to Plaintiff's Exhibit 85, do you know whether or not those ship-

ments of Voodoo cosmetics were made by the plaintiff's predecessors as shown in the invoices?

"A. Yes. I know they were made since all of the invoices in our files cover shipments actually made of the products covered by the invoices. This is further proved by the fact that those are the marks placed on invoices by the shipping department, indicating the date of shipment, postage paid, or transportation if it is not postage, weight and other data.

"Q115. Do you know whether there were sales of Voodoo products by the plaintiff's predecessors to retail outlets in California?

"A. Yes. I see an invoice, number 2975, covering a shipment of Voodoo nail polish to Terrell's in South Pasadena, California.

"Q116. And there are other sales to California in these invoices?

"A. Yes. I also note invoices to Roos Brothers, San Francisco, California.

"Q117. Have you ever heard of Rolley, Inc.?

"A. Yes, I have. [45]

"Q118. That is the defendant in this case?

"A. Yes.

"Q119. What was your first knowledge of this concern?

"A. I was informed that this concern was using the trademarks Voodoo and Forbidden Flame in the offering for sale and selling of its perfumes and colognes.

"Q120. Is the defendant Rolley, Inc., a customer of the plaintiff? "A. No.

"Q121. Has the plaintiff ever sold any of its Tabu or Voodoo or any perfume or cologne to defendant?

"A. Never. I looked into the record and could not find a single sale to that concern, nor any record of that concern.

"Q122. Have the plaintiffs ever given the defendant, Rolley, Inc., consent to use the trademarks Tabu, Taboo and Forbidden in any way?

"A. In no way.

"Q123. I show you Plaintiff's Exhibit 1 and ask if you have ever seen that before?

"A. Yes, I have.

"Q124. Calling your attention to Forbidden Flame and the word Rolley Reproductions, do you see that on Plaintiff's Exhibit 1?

"A. Yes, I see it. [46]

"Q125. What is Forbidden Flame a reproduction of?

"A. Naturally, Tabu, the forbidden perfume.

"Q126. Calling your attention to the date, October 12, 1944, on Plaintiff's Exhibit 1, were Tabu, Taboo, Forbidden and Voodoo cosmetics on the market at that time? "A. They were.

"Q127. Do you recognize any other names on the list as belonging to other concerns than Rolley?

"A. Yes. I recognize them as belonging to concerns other than Rolley. I recognize Mandalay as the registered trademark of Palmer's, Limited; Ballet as the registered trademark of Hudnut; Wicked as the registered trademark of Peggy Sage; Curtain Call as the registered trademark of Marie

Richieleu; Forbidden Flame as an obvious use of plaintiff's Tabu and Forbidden; White Christmas as an obvious copy of Caron's Christmas Night and Claire De Lune as the registered trademark of Colgate.

"Q128. Can you identify Plaintiff's Exhibits 86 to 89, inclusive?

"A. Yes. They are from Rolley, Inc., the defendant in this case. Plaintiff's Exhibit 86 is the perfume of Rolley, Inc., bearing plaintiff's trademark Voodoo; Plaintiff's Exhibit 87 is cologne by Rolley, [47] bearing plaintiff's trademark Voodoo; Plaintiff's Exhibit 88 is the sales slip of Plaintiff's Exhibits 86 and 87, and Plaintiff's Exhibit 89 is the bag in which these items were packed and which came from the defendant, Rolley, Inc.

"Q129. Are Plaintiff's Exhibits 86 to 89, inclusive, products of plaintiff or those of plaintiff's predecessors? "A. No.

"Q130. Have you ever seen any of defendant's Voodoo products on the market outside of their store in San Francisco?

"A. I have never seen them any place despite the fact that I have made an extensive search for them in Chicago and New York and have had search made for them in other cities outside of their store in San Francisco.

"Q131. What are the retail prices of plaintiff's Tabu perfume and cologne?

"A. Plaintiff's 1 dram Tabu perfume retails at $2.50; the ounce of Tabu perfume retails at $17.50.

The retail price of the two ounce Tabu cologne is $2.

"Q132. What are the retail prices of plaintiff's Voodoo perfume and cologne? [48]

"A. One ounce Voodoo perfume retails for $40; the colognes, $8.50 and $5.

"Q133. Does the plaintiff own a state registration of the trademark Tabu in California?

"A. Yes. Tabu is registered in every State in the Union, including California; the registration of Tabu in California is number 27543.

"Q134. Do plaintiff's own a state registration of Forbidden in California?

"A. Yes. Forbidden is registered in every state in the Union and plaintiff's registration of Forbidden in California is number 30388.

"Q135. Do plaintiff's own a state registration of Voodoo?

"A. Yes. The registration in California is number 32733.

"Q136. Which plaintiff owns these state registrations?

"A. The Tabu and Forbidden registrations are owned by Consolidated Cosmetics. The Voodoo registration was originally obtained by Consolidated Cosmetics and was assigned to Les Parfums de Dana, Inc., the other plaintiff in this case, which is now the owner thereof.

"Q137. Would you say that the words Tabu, Taboo and Forbidden have become associated with the products of Consolidated Cosmetics in the minds of the purchasing [49] public? "A. Yes.

Q138. Would you say that the trademark Voodoo has become associated with products of Plaintiffs in the minds of the purchasing public?

"A. Yes, because of the extensive advertising and widespread sale, these trademarks have come to indicate exclusively plaintiff's products.

"Q139. Would the use of Forbidden Flame cause confusion?

"A. Yes, it certainly would cause confusion. Old purchasers or new prospective purchasers, having seen plaintiff's Tabu and Forbidden, would think that Forbidden Flame was also one of plaintiff's products.

"Q140. Would the use of Voodoo by anyone other than the plaintiffs cause confusion?

"A. Yes, because of the widespread advertising and sale of plaintiff's Voodoo, anyone seeing defendant's Voodoo would think it was plaintiff's products.

"Q141. Would the use of Forbidden Flame and Voodoo cause damage to the plaintiffs?

"A. Yes, because persons who bought defendant's Voodoo or Forbidden Flame would deprive plaintiffs of sales of the genuine Tabu and Voodoo and thus cause them loss; furthermore, a customer buying defendant's [50] inferior Voodoo products would be disappointed in them and would not purchase in the future plaintiff's genuine Tabu or Voodoo products.

"Q142. Have there been any previous instances where infringers have used Forbidden in infringe-

ment of plaintiff's trademarks Tabu and Forbidden?

"A. Yes, there have been several instances.

"Q143. Have you copies of any of the judgments in any of these cases?

"A. Yes, I have and I will produce them.

"Mr. McKnight: Mr. Reporter will you mark these for identification Plaintiff's Exhibits 90, 91, 92 and 93?

"Q144. Can you identify these documents?

"A. Yes, Plaintiff's Exhibit 90 is a certified copy of the decision of the United States Patent Office, holding that "Forbidden Secret" of the Lander Company was confusingly similar to Forbidden, Tabu and the Forbidden perfume of plaintiff's predecessor, and denied registration of Forbidden Secret to the Lander Company.

"Plaintiff's Exhibit 91 is a certified copy of the decision of the United States District Court in Chicago, restraining Paul Dellecamp from using Forbidden Hour as confusingly similar to plaintiff's predecessor's use of Tabu and Forbidden. [51]

"Plaintiff's Exhibit 92 is a certified copy of a judgment in the Chicago Federal Court restraining the defendant from using Forbidden as an infringement of plaintiff's Tabu or Forbidden.

"Plaintiff's Exhibit 93 is a certified copy of a decision in the Chicago Federal Court restraining the defendant from the use of Forbidden in an infringement of plaintiff's Tabu and Forbidden.

"Q145. When were these decisions?

"A. The Lander decision, Plaintiff's Exhibit 90, was on August 1, 1944; the Dellecamp decision,

Plaintiff's Exhibit 91, was on April 19, 1946; the Max decision, Plaintiff's Exhibit 92, was on February 5, 1948, and the Hoffheimer decision, Plaintiff's Exhibit 93, was on October 25, 1948.

"Q146. Do you know whether or not Thrifty Drug is a customer of plaintiffs and sells Voodoo in San Francisco and Los Angeles?

"A. Yes, I do. That is shown by some of the invoices in Plaintiff's Exhibit 85. Thrifty Drug is sometimes referred to as Borun Brothers.

"Q147. Does Mr. James L. Younghusband hold any position with Dana Perfumes?

"A. Yes. The same Mr. James L. Younghusband, who is a partner with Consolidated Cosmetics, is also President of Dana Perfumes. [52]

"Q148. Have there been any previous instances where others have used Voodoo and have been restrained by court order from using this trademark?

"A. Yes. These are three documents, one of which is by court order and the other two are by agreement.

"Mr. McKnight: Let the Reporter mark these documents as Plaintiff's Exhibits 94, 95 and 96 for identification.

(Documents so marked.)

"Q149. Can you identify Plaintiff's Exhibit 94?

"A. Yes. Plaintiff's Exhibit 94 is a certified copy of a judgment of the United States District Court for the Southern District of New York, restraining Eterne Manufacturing Corp. and Para-

gon Distributing Corp. from using Voodoo Brown as an infringement of Plaintiff's trademark Voodoo.

"Q150. Who was the plaintiff in this New York suit?

"A. Consolidated Cosmetics, the plaintiff in this case.

"Q151. Can you identify the signature of the person who signed for Consolidated Cosmetics in Plaintiff's Exhibit 95?

"A. Yes. That is the signature of our counsel, James R. McKnight. [53]

"Q152. Do you know about this settlement agreement in Plaintiff's Exhibit 95?

"A. Yes, I do. The G. W. Keeton Company of Elmire, New York, had been using Voodoo on Perfume. They agreed to respect our registration of Voodoo and to discontinue the further sale of Voodoo perfume.

"Q153. Can you identify any signature on Plaintiff's Exhibit 96?

"A. Yes, I can. I know that is the signature of Howard Younghusband.

"Q154. Are you familiar with the facts concerning the settlement as shown by Plaintiff's Exhibit 96?

"A. Yes. That was another case, where Columbia Laboratories of Columbia, South Carolina, had been selling Voodoo perfume and agreed to respect Consolidated Cosmetics registration of Voodoo and to discontinue any further sale of Voodoo perfume.

"Q155. Do you know of any other instance where

Rolley, Inc., the defendant in this case, has used the trademark of another company?

"A. Yes. Rolley was denied registration because it was confusingly similar to the trademark Ralley of Coty, Inc.

"Q156. Have you any documents to support that statement?

"A. Yes, Here is the original copy of the [54] decision of the Patent Office holding Rolley confusingly similar to Ralley.

"Mr. McKnight: Will the Reporter please mark this original copy of the decision as Plaintiff's Exhibit 97?

(Document so marked.)

"Q157. Now, Mr. Guamer, a little earlier you said that there were state registrations of Tabu, Forbidden and Voodoo in the State of California, owned by the plaintiffs? "A. Yes, I did.

"Q158. Can you produce the originals of these documents?

"A. Yes, I can. Here they are.

"Mr. McKnight: Will the Reporter mark these documents Plaintiff's Exhibits 98, 99 and 100 for identification?

(Documents so marked.)

"Q159. Can you identify Plaintiff's Exhibit 98?

"A. Yes. That is the original certificate of registration of the trademark Tabu, issued to Consolidated Cosmetics, a partnership, consisting of James L. Younghusband, Howard Younghusband

and Paul Rowatt, and an assignment to the present Consolidated Cosmetics, consisting of James L. Younghusband and [55] Howard Younghusband, the plaintiffs in this case.

"Q160. What is Plaintiff's Exhibit 99?

"A. That is the certificate of registration of the trademark Voodoo, issued to Consolidated Cosmetics, the plaintiff in this case, and later assigned to Les Parfums de Dana, Inc., the other plaintiff in this case.

"Q161. What is Plaintiff's Exhibit 100?

"A. That is the registration of the trademark Forbidden, originally issued to Consolidated Cosmetics, a predecessor of the plaintiff, and assigned to Consolidated Cosmetics, which is one of the plaintiffs in this case. [56]

Mr. McKnight: I now offer in evidence Exhibits 1 to 100.

The Court: They may be admitted and marked next in order.

Mr. Hutchinson: Subject to the running objection?

The Court: Yes.

Mr. Hutchinson: The deposition as such has not been offered, your Honor. I assume it will be now. Otherwise, I would like to comment.

Mr. McKnight: I will offer this deposition also in evidence, together with Exhibits 2 to 100, inclusive.

The Court: Let them be admitted and marked.

The Clerk: Plaintiff's Exhibits 2 to 100, inclusive, admitted and filed in evidence.

(Plaintiff's Exhibits 2 to 100, inclusive, were thereupon received in evidence.)

Mr. Hutchinson: To the offer of the deposition and to the exhibits as incorporated therein, we wish to object to certain parts in addition to the other objections we have now pending.

First, we would like to object to the receipt of any information where evidence or opinion of the witness with respect to Tabu and its varients, and to Forbidden, for the reasons I outlined earlier, namely, it isn't an issue; that those names, Tabu, particularly, and variants, have never [57] been used; Forbidden has never been used, and the use of Forbidden Flame is so far back that the statute of limitations and laches would bar it anyway. No claim is made to it, and therefore I think that it is very well taken objection.

The opinion of the witness appearing at page 2 and following on the subject of ownership of the trademark Voodoo, our objection to that is that the statement or opinion, if it be received at all, be limited to the registration and not to imply there is any common law or use right. We have no objection to it being received as to ownership of the certificates outlined there.

With regard to the opinion of this witness that the names of these various perfumes as used by specific parties, Forbidden Flame, and so on, I think should be refused with regard to our main objection. If not, then we make further objection that he is not qualified, nor is any attempt to qualify

him made, that he is in a position to give informed opinion.

And also object to the receipt of judgments as between other persons and agreements as between other persons, they couldn't possibly have any bearing, being matters between another party, couldn't possibly be admissions or proof here, and do not relate to an earlier time.

Also wish to object to the portion of the deposition, [58] page 28 and following, with reference to the claimed imitation of perfumes and using of imitative names by the plaintiff, that being obviously a conclusion of the witness, and also being without foundation.

That is our objection, your Honor.

Mr. McKnight: No further comment.

The Court: I will allow the testimony to go in subject to motion to strike and over your objection.

Mr. Hutchinson: I am sorry, I didn't understand. We do not press for ruling now because I think it is only for such matters to be considered at the close of the case, and we stipulate that may be the case.

Mr. McKnight: Your Honor, I want to read the discovery deposition of Charles A. Rolley, who is President of Rolley, Inc., the defendant in this case. I am reading this deposition for the purpose of the admissions contained therein.

Mr. Hutchinson: Counsel, what are you offering? We object to the reading of this deposition, certainly, at this time. There was a request for

admissions and it has been answered and that is on file. That was subsequent to this deposition. Pleadings were here. This is the plaintiff's case now. The witness gave this deposition to be available only in the cross complainant's case. He will testify. I think it inappropriate to have the deposition read and then the testimony by the witness. [59]

The Court: His offer is limited now, limited to the admissions.

Mr. Hutchinson: Well, the whole deposition certainly needn't be read in that case. The admissions, I assume. The request for admissions was filed this Fall, in the last 60 days or so, and answer filed. Certainly they should make their own case on their own testimony. If they want to know whether there are omissions perhaps we can stipulate and save a lot of reading.

Mr. McKnight: I think we will have to read portions of this. I will leave out whatever portions I can that are unimportant, unless counsel wants to read them.

The Court: Very well, I will allow it. Objection overruled.

Mr. McKnight: (Reading)

"Examination by Mr. McKnight:

"Q. Will you please state your name?

"A. Charles A. Rolley.

"Q. And your address?

"A. Do you want my business address or home address?

"Q. Both.

"A. My business address is 182 Geary Street and my home address is 410 Elder Avenue, Millbrae, California.

"Q. What is your age? "A. 47. [60]

"Q. What is your occupation?

"A. Manufacturer of perfumes and cosmetics.

"Q. Do you have any connection with Rolley, Inc.? "A. Yes.

"Q. The defendant in this case?

"A. Yes.

"Q. What is your connection?

"A. President.

"Q. What is Rolley, Inc., a California corporation? "A. Yes, it is.

"Q. Are you a stockholder——"

The Court: What page?

Mr. McKnight: I am skipping to page 5 at line 9.

"Q. Are you a stockholder of Rolley, Inc.?

"A. Yes, I am.

"Q. Do you own most of the stock of Rolley, Inc.? "A. Yes, I do.

"Q. How large a percentage of the stock of Rolley, Inc., do you own?

"A. I own 5000 shares out of 8250 shares.

"Q. Are you the executive in charge of the operation of Rolley, Inc.? "A. Yes, I am.

"Q. Do you take orders from anyone else?

"A. I don't take orders. We have board of directors [61] meetings, of course. On certain things I would have to have permission from the board of directors.

"Q. But between board of directors meetings you are the executive in charge of running the company? "A. That's right.

"Q. What is the business of Rolley, Inc.?

"A. You mean what kind of business?

"Q. Yes.

"A. The manufacture and sale of perfumes and cosmetics.

"Q. Where is the business located?

"A. Our plant and office is at 718 Mission Street. We have a retail store and my personal office at 182 Geary Street—both in San Francisco.

"Q. And what kind of business is conducted at the retail store on Geary Street in San Francisco?

"A. The sale of perfumes, cosmetics, and to some extent sundry gift items.

"Q. And are practically all of the products of Rolley, Inc., sold retail from its store at 182 Geary Street, San Francisco?

"A. No. We do a wholesale business too, but they go from 718 Mission.

"Q. What percentage of the business of Rolley, Inc., is conducted at 182 Geary Street?

"A. At the present time I'd say approximately 50%. [62]

"Q. Do you sell any perfume wholesale?

"A. Oh, yes.

"Q. Would you say 50% of the business——

"A. Is wholesale.

"Q. ——is wholesale business? "A. Yes.

"Q. I had understood that those wholesale activ-

ities at Rolley, Inc., had practically ceased. Is that true? "A. No, that is not true.

"Q. How many employees are there at the manufacturing plant of Rolley, Inc.?

"A. That varies according to the time of the year.

"Q. Well, approximately how many on the average?

"A. Well, at some times it will run around five to six, and it drops down as low as three.

"Q. How many employees are there in your store at 182 Geary Street?

"A. Just a moment—let me see—one, two, three —in addition to myself there are two regular and occasionally an extra.

"Q. Is the business of Rolley, Inc., operating now at a profit or a loss?

"A. Well, actually at a loss.

"Q. And how long has it been operating at a loss? "A. The last two years.

"Q. What trade-marks does Rolley, Inc., use on its perfumes? [63]

"A. I don't know what you mean by the trademark. Do you mean a registered trademark?

"Q. Well, how do you mark your perfumes at Rolley, Inc.?

"A. Rolley Perfume, well, they are labeled with the word 'Rolley,' and then they are labeled with the distinct fragrance of each particular fragrance There are several of them.

"Q. You have more than one fragrance?

"A. We have several of them.

"Q. And a different name is given to each fragrance? "A. That's right.

"Q. Can you tell me approximately how many different names you use?

"A. At the present time around twenty-five.

"Q. Have you ever used the trade-mark Forbidden Flame on or in connection with any of your perfumes or colognes?

"A. Not since we were incorporated.

"Q. Prior to that time did you use the trade-mark Forbidden Flame on perfumes or colognes?

"A. We used—I did, rather, as an individual owner, use it prior—or I will say not later than 1943.

"Q. And as early as when?

"A. Oh, I would go back to 1939 or '40 on it.

"Q. So that you personally used the trade-mark Forbidden Flame on or in connection with perfumes or colognes from [64] 1938 or '39 to approximately 1943? "A. 1943.

"Q. And then you discontinued using the trade-mark Forbidden Flame? "A. Yes.

"Q. And you have not used it since that time?

"A. No.

"Q. And Rolley, Inc., has never used the trade-mark Forbidden Flame? "A. No.

"Q. On what products did you use the trade-mark Forbidden Flame?

"A. Perfume and cologne.

"Q. Why did you stop using the trade-mark Forbidden Flame?

"A. Because it was a poor seller.

"Q. Approximately how much in dollar volume did you sell of products bearing the trade-mark Forbidden Flame?

"A. I wouldn't know, because that is so far back I would not have the slightest idea.

"Q. Several thousand dollars?

"A. Oh, no. If it was that much I would have kept it. Nothing like that, no.

"Q. Do you claim that the corporation Rolley, Inc. the defendant in this case, is a successor to you personally [65] in the perfume business?

"A. Yes, it is.

"Q. Did you make any trade-mark search before adopting the trade-mark Forbidden Flame?

"A. Not what you would call a search. I checked on advertising and in different stores, and so forth, and I haven't been able to find anything like that; I could find no record of it at all.

"Q. Did you make any trade-mark search with a lawyer to determine whether there were any prior registrations of the trade-mark Forbidden Flame? "A. No.

"Q. Did you know that the trade-mark Forbidden Flame belonged to the plaintiff in this case, Consolidated Cosmetics at that time?

"A. I did not. I don't even know it now.

"Q. Have you ever heard of the trade-mark Tabu? "A. Yes, I have.

"Q. When did you first hear of the trade-mark Tabu?"

Mr. McKnight: The witness, when he gave his discovery deposition answered as follows: "Oh, be-

fore I went in the perfume business." Then when he signed his deposition, he changed it to: "After I went in the perfume business. I would say around at least 1937 or even prior to that, when they used to be sold only in Mexico, to my knowledge. [66]

"Q. Was that before you used Forbidden Flame on your perfume?

"A. The knowledge of Tabu?

"Q. Yes. "A. Oh, yes.

"Q. Do not 'Forbidden' and 'Tabu' mean the same thing? "A. No, not to me."

Mr. McKnight: Skipping to page 12, Mr. Hutchinson, line 3.

Mr. Hutchinson: May I suggest you read line 20 to explain the meaning given by the witness?

Mr. McKnight: All right.

Mr. Hutchinson: Line 20, on page 10.

Mr. McKnight: (reading)

"Q. Do not 'Forbidden' and 'Tabu' mean the same thing? "A. No, not to me.

"Q. Well, will you tell us how they differ?

"A. Well, I term 'Tabu' almost as a foreign word, or an American slang word. I mean that is my interpretation of it. I don't know what it is.

"Q. Does 'Tabu' mean 'Forbidden'?

"A. I don't know.

"Q. Have you ever looked it up in the dictionary?

"A. I have a long time ago, but I don't know what it means." [67]

Mr. McKnight: Do you want me to read on from there?

Mr. Hutchinson: I think the next two questions.

Mr. McKnight: (reading)

"Q. Well, can you give me any difference between the words in meaning? If you can, I would appreciate it.

"A. Well, what is the connection between the subject in hand and Forbidden Flame? I can't see it.

"Q. Well, suppose you answer my questions, Mr. Rolley? How does the word 'Forbidden' differ from the word 'Tabu'?

"A. Well, they just don't mean the same to me—that's all."

Mr. Hutchinson: I think that is all.

Mr. McKnight: We will begin at line 3, page 12:

"Q. Have you seen the word 'Forbidden' used in connection with the advertising of Tabu perfume?

"A. Recently I have seen it in the magazines, 'The forbidden perfume.'

"Q. How long have you seen advertising of Tabu, 'The forbidden perfume'?

"A. I don't recall.

"Q. Many years?

"A. Quite a long time.

"Q. How many years would you say?

"A. I really would not recall.

"Q. Would you say as early as 1937? [68]

"A. I don't really know when."

Mr. McKnight: That is what he said when he signed it. When he gave the deposition he said, "No, because I would not have taken interest in

it then; that was before I was in the perfume business." He is referring to 1937. The question was:

"Q. Would you say as early as 1937? No, I would not have taken interest in it then; that was before I was in the perfume business." When the deposition was signed, that was stricken out by the subscriber, Mr. Rolley, and he wrote in, "I don't really know when."

Mr. Hutchinson: If the Court please, I am not familiar with making an argument about changes a witness makes in the deposition. That is the purpose of having him read and sign it, and I don't believe we should have interpolated all these comments. It should be read as is. I think counsel's remarks about——

The Court: The objection is to your argument at this time.

Mr. McKnight: It isn't argument. I am not commenting on the value of what he did. I am merely telling your Honor what he said when we took the deposition, which I think is a very important question because the man at that time spoke spontaneously. Then after he had——

The Court: Consulted his attorney?

Mr. McKnight: I don't know. I presume he did. But all I [69] want to get in the record is what he said at the time he gave the deposition, without comment, and that was what he said when he signed it.

The Court: Very well, proceed.

Mr. McKnight: (continuing reading) "When did you first get interested in the perfume business?"

When the deposition was taken he said, "The early part of '38." When he signed the deposition he said, "The early part of 1933."

"Q. And didn't you notice it then?

"A. Not necessarily, no, because to me I would never interpret it as the name of a perfume. To me the name of the perfume, was, is, and always has been Tabu. It has never been labeled as 'Forbidden.' I have never seen a bottle of Tabu with the word 'Forbidden' on it; I have never known of a bottle with the label 'Forbidden' on it. It has never been sold, as far as I know, to the public or to the trade, with the word 'Forbidden' on it or connected with the word 'Forbidden' whatsoever. It would merely be using the word 'Forbidden' as an adjective. If I advertise a perfume and say it is a thrilling perfume, I don't see how anyone could say that the perfume name was Thrilling, when it is only a description of it; and to my knowledge before that time if I was to assume that an adjective used in perfume advertising was forbidden by other people to use, then I would have a complete misconception [70] of it.

"Q. What kind of fragrance did Forbidden Flame have?

"A. It was a heavy rooty, I would call it; you know, like roots, concocted in the ground.

"Q. Was it an oriental fragrance?

"A. Yes, I would term it that.

"Q. Somewhat similar to the smell or fragrance called Tabu?

"A. No, nothing like it at all."

The Court: We will have to have a demonstration on that.

Mr. McKnight: That is a matter that is up to your Honor. The exhibits are here.

Mr. McKnight: (continuing) "You wouldn't say that Tabu is an oriental fragrance then?

"A. Oh, yes, but there are different oriental types of fragrance, and there could be a great variation between all of them; but no person with the slightest knowledge of perfume or an individual buying perfume, any woman buying perfume, that would ever possibly say there was any relationship as far as fragrance is concerned.

"Q. Do you ever choose trade-marks for your perfumes or cosmetics which are similar to the trade-marks of other local concerns?

"A. I never have to my knowledge.

"Q. Have you ever used the trade-mark Claire de Lune on [71] perfumes or cosmetics?

"A. I used the name many years ago when I was individual owner of the business.

"Q. Do you know that this trade-mark Claire de Lune was at that time the property of the Colgate Company?

"A. Not of the Colgate Company. It was some other firm before Colgate bought them out, and the very day that I was notified or heard about it I discontinued using the name.

"Q. So you are not using the trade-mark Claire de Lune at the present time?

"A. I haven't used it for many years.

"Q. Did you ever use the trade-mark White

Christmas on perfume? "A. Yes.

"Q. Wasn't this perfume a copy of Christmas Night perfume?

"A. Well, that would be a matter of opinion whether it would be a copy of it or not.

"Q. Did you know that Christmas Night perfume was a famous perfume and on the market at that time?

"A. I believe there was a perfume called by a French name that meant Christmas Night. It was called Nuit Noel. It meant Christmas Night.

"Q. That was a perfume of Caron?

"A. That's right. [72]

"Q. Can you tell how the Christmas Night perfume smells? "A. No, sir.

"Q. Why did you discontinue the use of that trade-mark?

"A. Because it wasn't a good seller.

"Q. Have you ever used the trade-mark Forever on perfumes? "A. No, I do not.

"Q. Are you still using Serenade?

"A. No.

"Q. Are you still using Serenade?

"A. No.

"Q. Why did you discontinue it?

"A. The same reason.

"Q. Have you ever used the trade-mark Ballet on perfume? "A. Yes.

"Q. Do you know that that is a registered trade-mark of Richard Hudnut of New York on perfume? "A. No, I don't.

"Q. Are you still using the trade-mark Ballet?

"A. Yes.

"Q. Have you ever made any search for these trade-marks before using them?

"A. You mean legal search?

"Q. Yes. "A. No.

"Q. Why don't you do that? [73]

"A. Well, when I first started in I wasn't aware of that, and I could not afford it.

"Q. Is it your policy to take a trade-mark of a well-known perfume and use the mark or a similar mark on your products?

"A. No, it is not, because the moment it is called to my attention and they can show prior use of it I will immediately discontinue it, and have in the past.

"Q. Do you own the trade-mark Rolley?

"A. Well, that's my own name.

"Q. Do you own the trade-mark registration of Rolley?

"A. The original registration of it?

"Q. Wasn't it registered at one time?

"A. No.

"Q. Did you not have a report numbered 415,-153, on the trade-mark Rolley for perfumes?

"A. They declined it, to my knowledge.

"Q. Did you not at one time have litigation with Coty, Inc., in which Coty was successful in cancelling your registration of the trade-mark Rolley on the ground that it was confusingly similar to Coty's prior registration of the trade-mark Rally? "A. Rallet?

"Q. R-a-l-l-y—Rally for perfumes?

"A. They may have been successful in the reg-

istration, but [74] they have never been successful in preventing me from using my own name, which I was using and have always used and will continue to use.

"Q. Have they ever filed suit against you on it?

"A. They haven't.

"Q. But they were successful in having your registration of Rolleys cancelled, weren't they?

"A. That is right.

"Q. So that you did have a registration of Rolleys at one time?

"A. I don't know whether I actually had it or it was in for application and never went through. I don't remember.

"Q. Is that the only trade-mark that you ever attempted to register in the Patent Office?

"A. No.

"Q. What other trade-mark have you attempted to register?

"A. Response, Decollete, Frantic, and there may be one or two others that I don't remember. I will have to look up the records.

"Q. And you are owners of these registrations at this time? "A. Yes.

"Q. You or the company?

"A. Well, the company is now, because it was taken over by the company.

"Q. Are you familiar with the fact that trade-marks are [75] registerable in the United States Patent Office? "A. I am now.

"Q. How long have you known that?

"A. Oh, I don't know the exact time.

"Q. Well, you certainly have known it for several years, haven't you? "A. Yes.

"Q. When would you say you first knew a trade-mark can be registered in the United States Patent Office?

"A. Well, I wouldn't want to say. I don't know. I can't tell you when I first learn something.

"Q. In one of your early lists of perfumes did you refer to certain perfumes as Rolley Reproductions? "A. Yes.

"Q. What did you mean by the expression Rolley Reproductions?

"A. My interpretation of certain fragrances, certain odors, or whatever you want to call it.

"Q. Would you say that these perfumes of yours were intended as copies of other well-known perfumes? "A. Yes.

"Q. And were the trade-marks used on the Rolley perfumes to indicate which well-known perfumes were copied? "A. Only used numbers.

"Q. Well, I show you a list, which I would like to have the [76] reporter mark for identification Plaintiff's Exhibit 1, and ask you if that is your list? "A. Yes, it is.

"Q. Do you see the trade-mark Forbidden Flame down there? "A. Yes.

"Q. What was Forbidden Flame a reproduction of? Tabu? "A. No.

"Q. Well, what was it a reproduction of?

"A. I don't recall, but I do know it wasn't Tabu.

"Q. How do you know that?

"A. Well——

"Q. If you don't know what perfume it was, how do you know which perfume it was not? Because it might involve you in unfair competition?

"A. No, I just discontinued it. It is so long ago.

"Q. Will you let me see that list, please? That list came out approximately at what date?

"A. Either 1943 or prior to that date.

"Q. And you used it from 1943 on until——

"A. No, no.

"Q. When did you use it?

"A. Prior to '43.

"Q. Oh, prior to '43? "A. Yes.

"Q. Approximately when was it in use?

"A. Oh, I would say from—you mean these particular [77] perfumes?

"Q. No, that list.

"A. That list—it was in use from around approximately 1940 up until about 1943.

"Q. And was that distributed to customers and prospective customers?

"A. It was kept in our store, in our shop, for them to look at.

"Q. Now, when did you first use the trade-mark Voodoo on or in connection with perfumes or colognes?"

Mr. McKnight: He first answered when he gave the deposition, "Some time in 1938." When he signed the deposition, he wrote, "Some time in 1935 and possibly 1934.

"Q. About what date?

"A. I don't recall the exact date now. It was some time in the summer of—" He originally testified, "1938," and when he signed the deposition he inserted, "1934 or 1935."

Mr. Hutchinson: Excuse me, mine looks like 1935.

Mr. McKnight: 1934 or 1935. In the original, it was "1938."

Mr. Hutchinson: All right.

Mr. McKnight: (continuing reading)

"Q. Didn't you earlier state that your first use of Voodoo was some time on or about August 15, 1940? "A. That's right. [78]

"Q. Why do you change your testimony now on that?

"A. Because when I first called attention of Dana to their use of the word Voodoo, which I had been using for years, they asked me for some proof of prior use, and I only gave them what I thought was necessary at the time and it took—well, it took a little work and effort and everything to trace back and get the information, so I was never sure of myself and I gave them what I was not entirely positive of at that time."

Mr. McKnight: When he signed the deposition, he left off the last few lines and said he turned over what was handy at that time.

Mr. McKnight: (continuing reading)

"Q. You didn't furnish the Dana people with any information on selling Voodoo in 1938, did you?

"A. No, I didn't.

"Q. And did you know at that time what date

their trade-mark had—their registration of Voodoo?

"A. You mean when I furnished them with the information?

"Q. Yes.

"A. They wrote me a letter and told me that they had reported—they wrote me, and then I gave them by information.

"Q. And when did you first go into the perfume business?"

Mr. McKnight: The answer originally was, "The early part [79] of 1938." When he signed the deposition he wrote, "The early part of 1933.

Mr. McKnight: (continuing reading)

"Q. And you started with the trade-mark Voodoo? Is that right?

"A. Well, within a matter of a few months.

"Q. Is that the time when you were making reproductions of other well-known perfumes?

"A. That's right.

"Q. What was Voodoo a reproduction of?

"A. It was an original of my own.

"Q. And to whom did you sell Voodoo perfume in 1948?

"A. To my own retail customers.

"Q. Can you give me the names of any of them today?

"A. Well, I wouldn't have a record of retail customers that many years ago. I have in mind right now—I know of one person now living in Sacramento. I know she has been remarried a couple of times. I would have to trace her down. And

another one I know very well. She used to buy a lot from me. She passed away here about two or three years ago.

"Q. What is the name of this party in Sacramento that bought some Voodoo perfume from you in 1938?

"A. I would have to check my records and look it up.

"Q. You don't have any personal knowledge of it now? "A. Of her name now? [80]

"Q. Yes.

"A. No, because she has been remarried since then and I don't know what it is now.

"Q. You don't know her maiden name?

"A. I know it, but I can't recall it. That was a long time ago.

"Q. And she was an individual customer?

"A. Yes, she was an individual retail customer.

"Q. She didn't resell the perfume?

"A. No.

"Q. She purchased it from you——

"A. Yes, that's right.

"Q. ——and used it on herself?

"A. Yes.

"Q. And then you have another person, who has since died, that you sold Voodoo to in 1938? Is that correct?

"A. That I recall definitely on that perfume.

"Q. What was the name of the person that died?

"A. Mrs. Eleanor Coffee. That is spelled just like regular coffee."

The Court: I think it is time to go and get some coffee ourselves.

(Thereupon a recess was taken until the hour of two o'clock p.m.) [81]

Afternoon Session—2:00 o'clock p.m.

Mr. McKnight: Continuing this discovery deposition, your Honor:

"A. Mrs. Eleanor Coffee. That is spelled just like regular coffee.

"Q. And where did she live?

"A. On Sutter Street. I can't think of the hotel. It's right above Mason on Sutter Street.

I would know the name of the hotel if it was mentioned, but I can't think of it.

"Mr. Brown: Cartwright?

"A. No, that is up a block. It is right next to the Marines Memorial Building now.

"Mr. Brown: On the Beresford?

"A. No, that isn't it.

"Mr. McKnight: Q. And was that person a retail purchaser who used the perfume herself?

"A. Yes. She bought that and other perfumes too.

"Q. Do you have any other persons that you can tell use about who purchased Voodoo products from you in 1938?

"A. No, it would be impossible to remember at this time who the retail purchasers were that far back."

Mr. McKnight: That is the way the witness tes-

tified originally. When the deposition was signed the words "at [82] that time" were added.

Mr. Hutchinson: Excuse me, "at this time."

Mr. McKnight: "At this time."

(Continuing reading) "Q. They were your first customers, weren't they?

"A. No, not my first, but it just happened that one bought a great amount of stuff from me so naturally I have a vivid recollection of her.

"Q. And the other one bought——

"A. And the other brought several other people to me later on, and I got to know her quite well. That is how I happened to remember them. Otherwise I would not be able to remember them.

"Q. What time in the year 1938?

"A. I don't remember the exact date now.

"Q. When did you go into business in the year 1938?

"A. In the early part of possibly '38 I started."

Mr. McKnight: That is the way the witness testified originally, but when he signed the deposition he changed it to, "In the early part of 1933 I started."

(Continuing): "What month?

"A. That I don't remember.

"Q. Was it in March?

"A. No, I think—it could have been March, but I would say February would be closer. [83]

"Q. And where were you located at that time?

"A. 240 Stockton Street." Then he changed that when he signed the deposition, "212 Stockton Street."

Mr. McKnight: (continuing reading) San Francisco? "A. San Francisco.

"Q. Now, at the time that you adopted this trade-mark Voodoo you made no trade-mark search through an attorney? "A. No.

"Q. And all you did was to run around to some of the stores and see if it was on sale?

"A. Well, I looked around—I mean I used to read all the magazines, Vogue and Harper's and National magazines, where perfumes were most extensively advertised, and nobody had ever heard of it, and I had never seen or heard of it.

"Q. When you say no one had ever heard of it, whom did you talk to?

"A. Oh, buyers in the perfume departments of various stores.

"Q. Did you sell any Voodoo to any stores in San Francisco in 1938? "A. No.

"Q. In 1939? "A. No.

"Q. When did you first sell Voodoo perfume to any stores? [84] "A. 1943.

"Q. Prior to 1943 you confined your sale of Voodoo perfume to those who purchased it for their own use?

"A. I confined all my perfume business to those that used it for their own use.

"Q. Then you didn't start selling your perfumes until 1943 to the stores? "A. No.

"Q. For retail sale?

"A. No, we didn't—I didn't, rather.

"Q. Now, do you know that the trade-mark Voodoo was registered by the predecessor of the plain-

tiff in this case in the United States Patent Office in 1938? "A. No, I do not.

"Q. Have you ever seen a copy of the trade-mark registration of Voodoo of the plaintiff in this case?

"A. I don't remember ever seeing it.

"Q. Do you know that it has been filed in this case? "A. Voodoo?

"Q. Yes.

"A. Well, it was filed to my knowledge in 1939

"Q. Have you ever seen a copy of the trade-mark certificate?

"A. I don't remember if I did or not.

"Q. Now, if you had made a search of the Patent Office [85] records and found the registration of the trade-mark Voodoo in 1938, would you have respected that registration and refrained from using Voodoo on your perfumes?

"A. I don't know what I would have done in 1938, because I was new in the business and I didn't know a lot of things I have learned since then.

"Q. But you do not respect the plaintiff's registration today?

"A. No, because to my knowledge it is a question of usage.

"Q. Have you any knowledge as to the use of the plaintiff's trade-mark Voodoo in places other than San Francisco? "A. Please repeat it.

"Mr. McKnight: Will you read it, please.

"(Question read.)

"A. No, I have no knowledge as to the use of it any place prior to last year.

"Q. When did you first hear of the plaintiff's trade-mark Voodoo?

"A. A week before Christmas.

"Q. What was the occasion of your hearing of it then?

"A. There was approximately a half page ad run through I. Magnin & Company in the San Francisco Examiner or—yes, the Examiner.

"Q. Are you selling Voodoo perfume at the present time to any stores? [86]

"A. We have a couple of accounts that we recently sold to.

"Q. What are the names of those stores?

"A. One is the House of Fragrance in Seattle.

"Q. Yes. And the other?

"A. I don't recall offhand. I would have to look it up.

"Q. Have you ever sold Voodoo perfume to any one else—any other store?

"A. Yes, Meier & Frank in Portland.

"Q. How long since you sold Voodoo perfume to Meier & Frank?

"A. I would have to check the records on that to be sure.

"Q. You haven't sold them for several years, have you?

"A. Well, I would say not for two years.

"Q. What was the occasion for discontinuance of the sale?

"A. We used to have a department in Meier

& Frank's in Portland, and they carried a complete line of all our perfumes, and I found it a little costly. I wasn't big enough yet for such an operation, so we took the department out, and they still continued to carry my perfumes, but they confined it more to our faster selling numbers.

"Q. So that Voodoo has never been a fast selling number with you?

"A. It has been a steady selling number, but not a [87] big number.

"Q. Have you any idea as to the extent of your sales——"A. No.

"Q. ——roughly through Meier & Frank?

"A. Pardon me, please, for the interruption, but did you want more places where I was selling it?

"Q. At the present time do you have any other places?"

Mr. McKnight: The witness originally answered, "No, not at the present time." Then when he signed the deposition he changed it to "yes."

Mr. McKnight: (continuing reading) "A. Yes. You asked me where I sold it.

"Q. Yes, and you have stated Meier & Frank.

"A. Yes, but do you want me to go further than that?

"Q. No, I will ask you further at a later time; I will ask for it later. "A. All right.

"Q. Now, will you please tell me those of the twenty-one stores that you desire to add as parties defendant to your cross-complaint? Do you know who they are? "A. I have read them.

"Q. Have you sold Voodoo perfume to any of these twenty-one stores at any time?

"A. No.

"Q. You are not selling them now? [88]

"A. Not Voodoo.

"Q. Are you selling any of these stores any of your perfumes? "A. Yes.

"Q. But you are not selling any of them any of your Voodoo perfume or cologne?

"A. No.

"Q. Is your Voodoo perfume or cologne on sale in any of the department stores in San Francisco?

"A. No.

"Q. Is it on sale anywhere in San Francisco except at 182 Geary Street? "A. No.

"Q. Is it on retail sale at any other place in the United States at the present time except 182 Geary Street, San Francisco? "A. Yes.

"Q. Where?

"A. I would have to check my records to be sure.

"Q. Can you give me the names of any places at all?

"A. I wouldn't want to say offhand, because I would have to look up my accounts receivable records.

"Q. Have you any idea as to how many places of sale at the present time?"

Mr. McKnight: The answer originally, "Oh, I would say not [89] even two or three." When he signed the deposition he said, "Oh, I would say about six or seven." Then I asked him again, "Not

over two or three?" And he said, "Yes," then when he signed it he said, "Six or seven."

Mr. McKnight: (continuing reading)

"Q. And where would they be located?

"A. Well, of course, as I stated before, one is the House of Fragrance in Seattle; and then we had a recent order, oh, three or four months ago, from back in Washington, D. C.

"Q. This House of Fragrance in Seattle, Washington,—is that a perfume store, or what is their business?

"A. Perfumes and cosmetics and gift items.

"Q. Do you have any idea of their address in Seattle?

"A. Yes. I think it is 4252 East 45th.

"Q. And how long have they been purchasing Voodoo perfume or cologne from you?

"A. About a year and a half.

"Q. Have you ever seen any of the national advertising of the plaintiff's Voodoo perfume?

"A. Yes.

"Q. Have you ever had any advertising of your Voodoo perfume or cologne? "A. No.

"Q. Of any character? [90]

"A. Other than what you would see on that price list.

"Q. That is, you have done no advertising of Voodoo perfume or cologne in publications?

"A. No.

"Q. Now, referring to this list, Mr. Rolley, Plaintiff's Exhibit 1 for identification, what is your No. 1 Mandalay a reproduction of?

"A. Well, that is a matter of opinion.

"Q. Well, you state that they are reproductions don't you? "A. That is 1943.

"Q. Yes.

"A. I don't make the statement today, and haven't for years.

"Q. But in 1943 you did state they were reproductions, did you? "A. Yes.

"Q. What was it a reproduction of?

"A. Shalimar. We discontinued this entirely at that time by mutual agreement and understanding with certain representatives of the perfume industry, and have never since that time ever deviated from it.

"Q. Did you have any complaints on that language from perfume houses?

"A. Not from perfume houses, no.

"Q. Who did you have complaints from? [91]

"A. Well, one of their attorneys.

"Q. Attorneys for perfume houses?

"A. Yes.

"Q. Which houses?

"A. He didn't tell me.

"Q. But he objected to your using the word reproductions'?

"A. Yes. We had a discussion on it, and I think he pointed out to me that it wasn't permissible, so I agreed to discontinue it, and did so promptly, and have always abided by the understanding that we had.

"Q. Do you think that a trade-mark is an important factor in the sale of perfume?

"A. Certainly.

"Q. Why do you say that?

"A. Well, the name—a name is very important.

"Q. Would you say that you obtained repeat sales from the use of a trade-mark?

"A. No, you get repeat sales on the quality of a perfume.

"Q. That is, people remember the name?

"A. They will remember the name of the fragrance, yes.

"Q. Now, have most of your sales of Voodoo perfume and cologne been in San Francisco and California?

"A. Recently the biggest percentage of it has been, yes.

"Q. How large a percentage? [92]

"A. Well, I wouldn't say.

"Q. Would you say substantially a hundred per cent?

"A. Oh, no, no, I would not be able to give you an idea on that. I would have to audit my books to find that out.

"Q. Well, would you say substantially more than half has been sold in California?

"A. I would say more than half, but I wouldn't use the word 'substantially,' because that word means a lot of things.

"Q. Well, let's get this clear. Would you say that more than half of your sales of Voodoo per-

fume and Cologne has been in the State of California? "A. Recently.

"Q. Well, now, in the past——

"A. Not a few years ago it wasn't. A few years ago we sold more Voodoo perfume wholesale throughout parts of the United States than we did retail.

"Q. Now, what other places that you sold Voodoo perfume than Seattle, Washington?"

Mr. McKnight: At the time the witness signed the deposition he said: "Seattle, Washington; Honolulu, Hawaii; Sacramento, California; Washington, D. C. Those are the only places I can recall at this time." At the time he signed the deposition he added Alaska, Oakland.

Mr. McKnight: (continuing reading) [93]

"Q. Can you give us any figure as to the extent of the sales of your Voodoo perfume altogether?

"A. No, I would know.

"Q. What is the retail price of your Voodoo perfume per dram? "A. $2.00.

"Q. And per ounce?

"A. We don't have a straight ounce. We have an ounce and an eighth that runs $16.00.

"Q. What is the price of your Voodoo cologne?

"A. $2.75 for a four-ounce bottle.

"Q. That is the retail price?

"A. Retail. These are all retail prices.

"Q. Yes. Do you have any other packages of Voodoo cosmetics of any kind?

"A. Hand lotions.

"Q. What is the price on that—the retail price?

"A. Well, all our hand lotions, regardless of fragrance, sell for $1.00 retail.

"Q. So that you have Voodoo perfume in one dram and an ounce and an eighth?

"A. No, we have it in one dram, quarter ounce, half ounce, and one and an eighth ounce, and then we have it in cologne, and we put up our fragrances in body talc and sachet and bath oil. [94]

"Q. Now, did you ever have any trouble with Merle Norman? "A. Never.

"Q. Did you ever have any sales to them?

"A. Pardon me?

"Q. Did you ever have any sales to those people?

"A. Not to the Merle Norman Manufacturers. We used to do a very substantial business percentagewise with many of their retail outlets.

"Q. Did you ever have any lawsuit with them?

"A. There is one, I believe, that is filed or being filed right at the present time.

"Q. What is that in relation to?

"A. If I understand it correctly, they call it unfair business practice, conspiracy in restraint of trade.

"Q. Against Merle Norman?

"A. Well, we are filing it against them. They are the ones that committed the act.

"Q. Who is Margery Bell in Washington, D. C.?

"A. Well, Margery Bell at one time had a business in Washington, D. C., and also she sold the product for us to whoever had the concession in the

Statler Hotel—now, wait a minute. Is that the name of the hotel in Washington?

"Q. Castleton?

"A. No, the Statler; that is the one, the Statler Hotel. [95] And then she also had a dress shop, or a modiste, she called it, and she recently tried out our perfumes, and so forth, there.

"Q. Was she one of your sales persons?

"A. Afterwards, no. She at one time was, and then went into business for herself.

"Q. Do you know her address at the present time? "A. Yes.

"Q. What is it please?

"A. The Washington office—well, I would have to look it up in my file to get the exact address. It is Washington, D. C.

"Q. Would you please let us have that?

"A. Yes, sure.

"Q. And furnish that to the court reporter?

"A. Sure.

"Q. Is she a relative? "A. No.

"Q. Is she a friend?

"A. Well, I have known her for a long time.

"Q. What was the occasion for your first meeting her?

"A. Well, I don't remember, it is so long ago.

"Q. Well, how did she happen to start selling Voodoo perfume for you?

"A. She wrote me one time and—I sent her some perfumes [96] and things for Christmas for a gift, and she wrote and told me that she was quite surprised because she saw my name on them, our

label, and so I replied and told her what I was doing, and considerably—sometime considerably later I went to New York in—let's see, 1938—no, that was not the first time—I don't remember the time I went to New York now, but it was in the early forties, and so I told her I was going back there, and so she asked me to please come on to Washington, and so my wife and I went on to Washington, and she told me she was very interested in getting into some business of her own, and I told her at the time I wasn't quite ready for such fast expansion, and so—well, we corresponded for a while and later on she wrote me and wanted to keep—she wanted to represent me, which she did for a while in through that territory.

"Q. About when was this, Mr. Rolley?

"A. Well, it was around 1944 or '45. And then she decided to go into business for herself. Travel was too tough during the war.

"Q. And did she sometime later go out of business? "A. Yes.

"Q. How long was she in business for herself?

"A. If I remember correctly, approximately two years.

"Q. After 1945? [97]

"A. Yes, approximately from 1945 to 1947.

"Q. Now, does Rolley, Inc., have any registration of the trademark Voodoo in the United States Patent Office? "A. No.

"Q. Have you ever filed an application for such registration? "A. No.

"Q. What is the litigation that you have with Merle Norman regarding unfair practices?"

"Q. Do you sell Merle Norman Voodoo cosmetics?

"A. We don't sell Merle Norman anything now.

"Q. Have you ever sold them Voodoo cosmetics?

"A. Not Merle Norman. We sold a retail outlet of one of Merle Norman's accounts.

"Q. Is that the one in Sacramento?

"A. That is the one in Sacramento.

"Q. Is that the one you are suing?

"A. We are suing the manufacturer, basically.

"Q. Well, does this store in Sacramento have anything to do with it?

"A. Oh, sure, because they are the ones, or one of the ones that the Merle Norman Company forced into the boycott.

"Q. Were they boycotting Voodoo perfume at that time?

"A. No, they were boycotting Rolley, not Voodoo.

"Q. Including Voodoo perfumes? [98]

"A. Including everything I had.

"Q. You mean by 'boycotting' that they were refusing to buy from you?

"A. Merle Norman ordered them to discontinue buying Rolley products, under the threat of no longer selling them cosmetics.

"Q. And your suit is pending against them where—against Merle Norman where? Here in San Francisco?

"A. I presume so. My attorney knows. I don't know.

"Q. In the Federal Court or the State Court?

"A. That I don't know.

"Q. Does Rolley, Inc., own any registration of the trademark Voodoo in any state of the United States? "A. No.

"Q. Have you ever filed an application for the registration of Voodoo in any state of the United States? "A. No.

"Q. So that any rights that you claim to the trademark Voodoo are not based on registration of any name? "A. It is based on usage.

"Q. But it is not based on any registration?

"A. No.

"Q. Who made your labels with the trademark Voodoo in 1938?

"A. A place called Quick Print Press. [99]

"Q. Where is that located?

"A. I don't know where they are now. They are in the telephone book.

"Q. A San Francisco concern? "A. Yes.

"Q. Is it still in business?

"A. Yes, it was the last I recall—at least four or five months ago.

"Q. Is that where you got all of your early labels for Rolley perfumes?

"A. In the beginning, yes.

"Q. And in those days did you call them all Rolley perfumes?

"A. Oh, yes; everything has been called Rolley, but not the fragrance.

"Q. I mean did you have the word 'Rolley' on all of your labels? "A. Yes, sir.

"Q. And in addition to the word 'Rolley' you would have another trademark?

"A. Yes, that's right.

"Q. And you say that those labels were printed for you by the Quick Print Press in San Francisco?

"A. Yes.

"Q. Is that the concern down here at 942 Market Street, San Francisco? [100]

"A. That's right.

"Q. That concern was not located there at the time you bought them?

"A. I don't know; I don't remember now where they were then.

"Q. For how long a time did they print your labels? "A. I don't remember that either.

"Q. A thousand? Five thousand?

"A. Well——

Mr. McKnight: At the time of taking the deposition he said, "A hundred? A. Well, more than sition, "I do think it would be five thousand." Then he changed that to, when he signed the deposition, "I do think it would be fiive thousand."

Mr. McKnight: (Continuing reading).

"Q. Have you any other information that you can give me today in regard to your alleged sale of Voodoo cosmetics in 1938?

"A. We took a lease on the——

"Mr. Brown: No, he asked you about sales.

"A. Pardon me.

"Mr. Brown: He is asking you about the sales, individual sales.

"A. What do you mean? To individual people?

"Mr. McKnight: Yes.

"A. Oh, no.

"Q. So that all you can give me is this one person who [101] died, and this other person whose name you can't recall? Is that correct?

"A. That's right. I didn't keep a record of names and addresses at the time.

"Q. You don't have any record now of that?

"A. Oh, no; that was years ago.

"Q. So that all the information you have is oral, only from memory in regard to those early sales of Voodoo? "A. That's right.

"Q. You don't have any written documents on the subject at all? "A. No.

"Q. Have you any record of sales?

"A. No.

"Q. Do you have any ledger?

"A. Not that far back, no; I wouldn't keep my books after so many years.

"Q. When do the books begin? How far back do they date?

"A. My personal records before I was incorporated?

"Q. Yes.

"A. I don't know offhand. I would have to look them up. It was just a little black book I kept notes in.

"Q. Do you have that little black book today?

"A. I don't know if I have the original one or not.

"Q. But you have nothing documentary?

"A. Prior to what date? [102]

"Q. 1944? "A. No—1940.

"Q. 1940 was the beginning of your documents? Is that right?

"A. Yes, that's right; either accounts or any printed matter or anything else that I could produce.

"Q. You haven't any of your first invoices of sale of a Voodoo in 1938, or copies of them?

"A. Oh, no.

"Q. So that anything like that you don't have before 1940?

"A. No. We just used to make out a little tag, and then I would enter the tag in my little book, and that was all.

"Q. Have you any copies of your original labels? "A. No.

"Q. What labels have you got today of your earliest use? Have you any early labels going back——

"A. Well, I could look, but I don't think——

"Q. Have you any labels prior to 1944?

"A. Well, not the same early labels, because I used them up and had some reprinted.

"Q. You didn't keep any of the old ones?

"A. No, I didn't keep them—unless there would be one lying around or a few lying around some place.

"Q. What are the earliest orders that you have

from stores or from individuals for the sale of Voodoo colognes [103] or cosmetics of any kind?

"A. For the stores would be sometime in 1943.

"Q. And from individuals?

"A. From individuals I didn't—well, I wouldn't have a written order.

"Q. You never had any written orders from individuals?

"A. No, they would just merely come in and pay cash for it, and that was it.

"Q. So the earliest documents that you have with relation to the sale of Voodoo perfume or cologne dates back to about 1943 or '44? Is that right?

"A. That's right—I beg your pardon. I would like to add something to that.

"Q. Please proceed.

"A. That one particular sheet of paper that you had me look at before was made in 1943, and the name Voodoo was on it, and——

"Q. Where is that? "A. In my hand.

"Q. You say that that was prepared in 1943?

"A. No, it was prepared—that was prepared prior to 1943, but I don't know when.

"Q. Well, was it any earlier than 1940?"

Mr. McKnight: The witness answered at that time, "No, not earlier than 1940." When he signed the deposition he wrote, [104] "I can't recall."

Mr. McKnight: (Continuing reading).

"Q. Was it any earlier than 1942?

"A. I would say yes.

"Q. In fact, there is a letter on the back of it dated October 12th, 1944? Is that right?

"A. That is correct. I used them when I discontinued price sheets for our products, as I referred earlier. Rather than just throwing them away, I used the other side for second sheet.

"Q. You were in business as Charles A. Rolley, an individual, prior to the formation of Rolley, Inc.? "A. That's right.

"Q. And Rolley, Inc., is the successor to you as an individual?

"A. Yes. We didn't call it Charles A. Rolley; we merely called it Rolley Perfumes.

"Q. And that Rolley Perfumes really meant Charles A. Rolley doing business as——

"A. That's right.

"Q. And were you the sole owner?

"A. Yes, sir.

"Q. Was there anybody that worked for you at that time? "A. Oh, yes.

"Q. Do you have any one in mind that worked for you in [105] 1938? When you got started?

"A. Yes.

"Q. Any one living at the present time?

"A. Yes.

"Q. Can you give me the names and addresses?

"A. Well, I haven't been able to check them yet. I have been trying to do that, because I want to find them, more so I think than you do. There is one man I hope to locate in the near future.

"Q. What is his name?

"A. He is not living in San Francisco. His name is Roy Rodberg.

"Q. What did he do?

"A. He just worked with me, helped me out in all the different work.

"Q. Was he the only employee you had?

"A. Well, at one time. Of course, we had others.

"Q. Well, during the period from the time you started in the business of selling perfumes up until 1944?

"A. Oh, no, I had different employees in that period of time.

"Q. All right. Let us say between 1938 when you started, and 1940, who worked for you besides Roy Rodberg?

"A. I would have to check away back in my records to find that out, because I don't remember; there have been [106] a lot of people that worked for me since then, and I wouldn't know for sure.

"Q. Men or women?

"A. I have had both since then.

"Q. Didn't you do most of the selling yourself?

"A. You mean at that time?

"Q. Yes.

"A. I did a good percentage of it, but he did quite a bit of it, too.

"Q. At the place on Stockton Street did you manufacture the perfumes there? "A. Yes.

"Q. And sell them from there?

"A. At 212 Stockton?

"Q. Yes. 212 Stockton Street. "A. Yes.

"Q. And that continued until when?

"A. April, 1940.

"Q. And where did you go then?

"A. 239 Geary Street. The reason I moved was because our business in perfumes was getting better, so I needed a better place and a little more room.

"Q. At 239 Geary Street who worked for you when you first went there?

"A. A girl by the name of—well, Roy Rodberg worked [107] with me there for a while, and then he was drafted, and then I had Natalie Anis.

"Q. Where is she employed now?

"A. She is still working for me.

"Q. And when did she first start working for you?

"A. She came to work for me when we moved over there, within thirty days, so it would be April or May, 1940.

"Q. You don't know of any one whose name you can give me today that worked for you selling Voodoo perfumes and cologne prior to 1940?

"A. I am going to try and find out what the present name of this party is in Sacramento, and I will have to find somebody that I know that knew her then, and find out what her name now is, and see if I can locate her.

"Q. And she is the only one you had?

"A. That is the only one that comes to my mind at present, yes.

"Q. And what was her maiden name?

"A. I don't remember.

"Q. And she worked for you when?

"A. No, she never worked for me.

"Mr. Brown: She was a customer.

"Mr. McKnight: Q. Oh, she was a customer?

"A. Yes.

"Q. But there was no one who worked for you that sold [108] Voodoo perfume or cologne for you prior to 1940 that you can recall now?

"A. Roy Rodberg.

"Q. That is the only one?

"A. The only one that I can remember, yes; he would be the only one that sold it."

Mr. McKnight: I would like to offer in evidence Plaintiff's Exhibit 1 at this time.

Mr. Hutchnson: That is particularly this price sheet?

Mr. McKnight: That is right.

Mr. Hutchinson: We would like to object to that being received, if the Court please, because it long antedates any of the issues herein, and relates only to Voodoo in so far as any issues herein is concerned. That is, it was used in 1943. If counsel wishes to stipulate, we will join with him it was in 1943 and before, item 54, Voodoo, was offered and sold at the prices there, and we object to all the other as being outside the issues of this case.

Mr. McKnight: I think it shows the entire picture. It is admitted by the defendant and is particularly important because it shows the essence of unfair competition. It is a document that has these Rolley reproductions on it and I think it is important to tie in with the element of intent in this case.

Mr. Hutchinson: I would like to have it noted

in the [109] record and called to your Honor's attention that at a proper time we will, of course, object to any claim of reproductions or other things that wouldn't relate to Voodoo, and the evidence is clear it is always claimed as an original. The deposition is now being offered?

Mr. McKnight: I will offer what I have read for the purpose of the admissions.

Mr. Hutchinson: Very well. I would like to make some reservations under the same understanding I had before, to be ruled on when the case is submitted.

First, I would like to object to portions of the deposition, and I needn't detail them now, that relates to all names other than Voodoo, for the reason stated; and particularly with reference to Tabu, Forbidden, and its variants, as referred to there.

Second, those portions that deal with sales or absence of sales to stores now being sold by the plaintiff, that being entirely immaterial, in addition to the other reasons stated earlier.

Third, reference to all other brand names, those related to other owners, asserted or referred to in the testimony, as well as to those of the cross-complainant and defendant; and, fourth, any reference to the Merle Norman affair. That is entirely a matter before and between other parties, couldn't possibly refer to Voodoo, and there is nothing in the deposition [110] that suggests any other. And that ruling be reserved until later.

The Court: Very well.

Mr. McKnight: That closes our prima facie case, your Honor. We rest.

Mr. Hutchinson: If the Court please, we do not at this time propose to make a motion for non-suit for the reason that we are cross-complainants here and, as remarked earlier, we are all here from some distance, and having put the Court to the trouble of hearing this, I think it is better to hear the record as we are set.

We ask relief by way of injunction. I would like it noted, it is my understanding of this record now there is no showing of any use or usability or sale by the name Voodoo, or anything presented by the plaintiff in any of those three western coastal states I have mentioned, Honolulu, Alaska, or Washington, D. C., prior to the date referred to by the plaintiff in his deposition as read; and particularly anything prior to 1948 in those area.

Also, there is no showing of any sales anywhere prior to 1948, as I recall the record.

With that understanding, we will proceed to our testimony, your Honor, and I will call Mr. Rolley. [111]

CHARLES A. ROLLEY

a witness called on behalf of defendant and counter claimant, being first duly sworn, testified as follows:

The Clerk: State your full name and occupation to the Court.

A. Charles A. Rolley—R-o-l-l-e-y—Manufacturer of—retailer of perfumes and cosmetics.

(Testimony of Charles A. Rolley.)

Direct Examination

Mr. Hutchinson: Q. Mr. Rolley, what is your business or occupation, or connection with business houses? A. I beg your pardon?

Q. What is your business or occupation at the present time?

A. I am the President of Rolley, Inc., and General Manager of the same, and my work is to manufacture perfumes, promote them, advertise them, and generally manage the business.

Q. That is a California corporation, is it?

A. Yes.

Q. When was it organized in California?

A. It was incorporated April 30, 1946. Now, I may be two or three days off in that exact date.

Q. In any event, it was the first half of the year 1946? A. That is correct.

Q. Prior to that time, that is, immediately prior, what was your personal business, if any?

A. I was in the same business, but I was sole owner of the [112] business.

Q. So at that time, at the time the corporation in effect took over the business, you had been handling it as a personal and individual operator, is that correct? A. That is correct.

Q. And you operated it, I believe, the comments in the deposition, as Rolley Perfumes, is that correct? A. That is correct.

Q. Prior to your entering into the perfume work, what was your business or occupation?

A. Well, many years before I went into the

(Testimony of Charles A. Rolley.)
perfume business I was manager of the Frank Moore Shoe Stores. Then I went back to New York and managed I. Miller's there, then I came out and went to work for Ransohoff's for a short time. Then in 1931 I opened up what I called the San Francisco Dye Works.

The Court: A dye corporation?

A. Yes, a dye corporation. That was the dyeing of shoes and bags, gloves, and suede things like that. And in 1933 I made my first perfumes. Now, I didn't go into any form of cosmetics until many years afterwards. By cosmetics I mean face creams, make-up, lipstick, and stuff like that.

Mr. Hutchinson: Q. In 1933, then, was your first contact with the perfume business in any way?

A. That is correct.

Q. Prior to that time had you been engaged in any sort of [113] manufacturing? A. No.

Q. You had been an employee of the establishment you refer to, is that correct?

A. That is correct.

Q. So that this dye work consisted of a service trade, so to speak, is that correct?

A. That is right.

Q. You didn't purchase or sell any particular product?

A. For a little while there I tried to sell shoe dyes.

Q. And that was a very short lived operation, is that correct? A. Yes, it was.

Q. And you had not had any particular training

(Testimony of Charles A. Rolley.)
at that time, had you, in merchandise or copyrights and trademarks and that sort of thing?

A. I had training in retail merchandise in the shoe business, but not any pertaining to copyrights or that.

Q. As a matter of fact, they do not generally trademark shoes, isn't that so?

A. No. The only thing is the manufacturer's name, to my knowledge.

Q. In your business of this dye works, where was your first place of business?

A. Just a moment, please. 285 - 287 - 289—it would be, [114] I think; 289 Geary Street; two entrances in the St. Paul Building one on the corner of Geary and Powell Streets.

Q. That was an upstairs location, was it?

A. That was one room.

Q. One room. Subsequently you moved some other place?

A. A month or six weeks later I moved to 212 Stockton Street.

Q. That is the Stockton Street address referred to in the deposition, is that right?

A. That is right.

Q. I believe in the deposition you previously stated it was 240, didn't you?

A. That was confused. After I gave that address I got thinking, and after all I had never been in the 240 Stockton Building, and I got confused in the number.

(Testimony of Charles A. Rolley.)

Q. How long did you stay in the 212 Stockton Street number, do you recall?

A. Until some time in 1939.

Q. From 1933 to 1939, is that correct?

A. No, from 1932 to 1939.

Q. 1932 to 1939. And your principal business at the beginning was this renovation, dyeing and rehabilitation of leather goods, is that correct?

A. In the beginning, yes.

Q. In 1933, I believe you stated, you started doing something [115] with perfumes. Will you tell us very briefly what that consisted of in the early part of 1933?

A. Do you want me to tell you how it started?

Q. Yes, in a brief way.

A. There was a Mr. Moreland came up to my place one time there, and he was selling chemical supplies, and at that particular time, as we all know, there was a depression on. At the time the banks were closed, and things like that.

I had been offered a sales manager's job for a New York City cosmetic house, so I had, of course, to take on training with them on cosmetics, and after I spent a couple of months there I decided I didn't want to continue there because I couldn't see any financial future in it for myself.

But in the meantime this Mr. Moreland had come to my place and he had asked me where I got the cosmetics, and I told him what had happened, and he asked me did I pay for them and I said "Yes." I told him I got a 60 per cent discount. He told me I was a sucker because it cost them about 15 cents

(Testimony of Charles A. Rolley.)
a jar and I was paying, about, even with the 60 per cent discount, over a dollar a jar.

We had a discussion that I told him he was exaggerating and I didn't believe it. So he told me he would prove it to me. So a few days later he came back up to my place by prearrangement and we made some creams and kept a record of what it cost, and he proved to me that it would only cost 15 [116] cents a jar. Then he took a jar home to his wife, I took a jar home to my wife for criticism, and they said it was a little stiff, or something, so we made some more then. He came to my house, and we sort of waited three or four days until we had the sort that women like. And my wife said, "Feels good, but it doesn't smell good."

I said, "It doesn't smell bad," but she says, "It isn't perfumed."

I went back and told Mr. Moreland that and he said, "That's got nothing to do with it." I says, "After all, women like perfume." I said, "I am going into the business." He said, "You want to go into the business, go ahead."

So any place I could make a dollar in those days, I was looking for it. So I got intrigued with it, and he says, "If you want to go into it, I will show you the angles, I will show you where you get your stuff, I will show you what contacts to make."

It was through Mr. Moreland, then, and those contacts and everything he did in assistance with me, got me started in the perfume business.

Q. Except for the couple of months training you

(Testimony of Charles A. Rolley.)

had as a prospective sales manager for the Middle West cosmetic house, you had never had any other business dealings with the perfume or cosmetic business, is that right? A. No, never. [117]

Q. You didn't make any particular study through analysis of cosmetics or scientific treatises at that time? A. No.

Q. During 1933 did you then make any actual perfumes?

A. Yes, in the fall of 1933.

Q. What did that consist of?

A. I made five or six different perfumes.

Q. Did you make them in quantity?

A. Not too much, because we were working mostly on samples from manufacturers.

Q. That is, the raw materials? A. Yes.

Q. Did you attempt to name any of those products?

A. Not at Christmas time, because I gave things away to different girls around the different stores that I had been doing business through, and instead of giving them a box of candy or something, I gave them a little bottle of perfume.

Q. They were not represented as being any particular name or kind?

A. No. In fact, I didn't recall even what girl I gave what perfume to.

Q. After this Christmas distribution, did you do anything further with naming perfumes?

A. Yes. After Christmas different girls called me and thanked me for it, and told me they thought

(Testimony of Charles A. Rolley.)
the perfume was [118] wonderful and where did I get it, and started asking concerning the brand and name, so I didn't like them to know I made it. They wanted to know if they could buy it at a cheaper price than they were accustomed to paying. So I decided if I was that good, had talent which I hadn't realized before, I was going in the business. So that is when I started actually going in the perfume business.

Q. That was early in 1934?

A. That would be early in 1934.

Q. What did you then do in a general way in the perfume business? Did you or did you not then undertake to make perfumes and bottle them and sell them?

A. I made perfumes and bottled them, and I would have customers come up to my dye shop, and I had a little display there in a case and they would comment about the perfumes, so I would sell them the perfume.

Q. As a matter of fact, those customers were, in part at least, retail purchasers, is that not so?

A. I beg your pardon?

Q. Those customers in general were largely retail purchasers of your services in the dye shop?

A. That is right.

Q. And you started selling them at that time, is that correct? A. That is right. [119]

Q. At the very beginning can you recall any of those products you developed in the perfume field by name? A. Yes, I do.

(Testimony of Charles A. Rolley.)

Q. Will you state a few of the names you first used?

A. One was Forever, Garden Pinks, Red Red Rose. Well, those were the very first ones. Then some of the others I gave numbers to.

Q. At one time I believe you had what you called reproductions in your perfumes?

A. That is right.

Q. Will you tell us very briefly what that consisted of and when you did it, and if you did.

A. People would come to me and ask me if I could make a perfume like some perfume they had been buying, and I would tell them I would try, so I would work and make that particular perfume they had liked, and they would buy it. That was a reproduction. It was my interpretation of the fragrance of some other perfume.

Q. Were those given any particular name, those so-called reproductions?

A. Oh, no, they were given numbers.

The Court: Pardon me, what do you mean by a reproduction? I don't clearly follow.

Mr. Hutchinson: These items which were made up as his impression of other existing perfumes.

The Court: I think they are referred to as reproductions?

Mr. Hutchinson: Yes. I don't mean to say they are actually reproductions, but that is the name that has been used in the deposition, and, I think, in the pleadings.

The Court: It has been repeated a number of times.

(Testimony of Charles A. Rolley.)

Mr. Hutchinson: Yes.

A. I would mean it is my interpretation.

Mr. Hutchinson: Q. In other words, you did not analyze anyone's perfume, or have it analyzed, or copy therefrom?

A. No, you don't have to do that. You do it with your nose.

Q. This is an idea or concept of yourself of the nature and quality of the scent that they liked, is that correct? A. That is right.

Q. You did this type of thing for how long, do you remember?

A. I did it until 1943.

Q. At that time I think from your deposition it appears that you were called upon by some representative of some perfumery association, or something of that nature is that right?

A. That is right.

Q. At that time you were advised that that was of doubtful propriety from their point of view, is that correct? A. That is right [121]

Q. You were not sued or prosecuted?

A. Oh, no.

Q. Was that your first realization that what you were doing might or might not be in question?

A. That is correct.

Q. The other perfumes that have been referred to, those by name, from the beginning, were your own concept, is that true?

A. My own origination.

Q. What about the names you gave them? Where did you get those?

(Testimony of Charles A. Rolley.)

A. We would hunt for names almost any place, try to create a name that would fit our particular perfume.

Q. Did you attempt to copy or did you in fact copy anybody else's names for these perfumes?

A. Never. Never intentionally.

Q. In particular reference to some that have been referred to here, did you ever use the name Tabu, spelled either T-a-b-u or T-a-b-o-o?

A. I have never used it.

Q. Have you ever used "Forbidden" in any connection?

A. I used many years ago "Forbidden Flame."

Q. Do you recall the date when you used it, and the date when you ceased to use it?

A. It would be some time in the, oh, the middle or late '30s I first started to use it, and I discontinued using it [122] in 1934 to 1935.

Q. Now, did you at that time——

A. I mean—pardon me—I didn't mean to say 1934 to 1935. I mean 1943 to 1945.

Q. At the time you adopted and used that name, was that your impression, reproduction, or anything of that kind of any other perfume?

A. No. Well, we might possibly have used another perfume at that time called Toujours Moi.

Q. Is that related to Forbidden Flame?

A. The fragrance would be similar.

Q. And——

Mr. Hutchinson: By the way, I might inquire of counsel if that is one of the products that is complained of here?

(Testimony of Charles A. Rolley.)

Mr. McKnight: No, because the Toujours Moi is a product of another concern called Cordet, I believe.

A. That is right.

Mr. McKnight: It is a famous perfume.

Mr. Hutchinson: Q. At that time, consciously or otherwise, did you adopt any name related to Tabu or any name related to Taboo?

A. Never.

Q. Did you similarly with regard to Forbidden, if that were related to Tabu—— [123]

A. Would you repeat that?

Q. I will withdraw that. It is rather complex. Did you consciously, in the words "Forbidden Flame" intend to suggest Tabu?

A. No, definitely not. I couldn't see any connection.

Q. Did any of your customers at that time, as you now recall, indicate any error or mistake as between the two? A. Never.

Q. With reference to Voodoo, do you recall when you first used that name?

A. It was some time either in '34 or '35. I can't give you the exact date.

Q. Where were you maintaining your operations at that time? A. 212 Stockton Street.

Q. Do you recall who was working for you at that time, if anyone?

A. I wouldn't know, sir. I wouldn't know whether it was a fellow by the name of Larry McKay, whom I have been unable to trace, or might

(Testimony of Charles A. Rolley.)
have been another fellow that at the time worked for me for about three months.

Q. Do you recall the perfume you made and sold under the name of Voodoo?

A. Oh, surely.

Q. Was it a reproduction or impression of yours of any [124] other perfume?

A. It is an original creation of mine.

Q. And at all times it had remained so, is that correct? A. That is correct.

Q. You were then engaged in a retail business, is that correct? A. That is right.

Q. Didn't do any wholesale, or didn't attempt to sell wholesale? A. No.

Q. What manufacturing equipment you required was maintained in the same establishment with your dye equipment, is that right?

A. Also had some at home.

Q. This wasn't your only business in these times?

A. No, I still have the dye works.

Q. Do you remember any of the customers you had for Voodoo in the early years, 1934, 1935?

A. Of course I remember Mrs. Coffey very well. And not as early as 1934 and 1935, but in 1938 I remember another woman that was brought out in this deposition, but she has been married about three times, and I can remember her first name, but I don't know what her last name is now.

Q. Were your services——

A. (Interposing) May I continue? [125]

(Testimony of Charles A. Rolley.)

Q. Excuse me.

A. Since the last years I have made contacts, or had contacts made with me with other persons who have recalled buying the perfume as early as 1935, and I didn't remember their names until, of course, they come into my present shop and happen to bring up the fact that they remember me when I first started out, and how happy they are to see me getting ahead, and things like that.

Q. Have you inquired of them their recollection of having purchased Voodoo? A. Yes.

Q. Are any of those purchasers now available who were customers at that time that you didn't mention in your deposition?

A. One has promised to be here, and the other is trying to get permission from her husband to come here.

The Court: What is that? Woman trying to get permission from her husband to come?

Mr. Hutchinson: She is in Sacramento.

The Court: Why does she have to get permission?

A. She just says her husband objects to it.

The Court: What is his business or occupation?

A. This woman lives in Sacramento and I have merely talked to her on the long distance telephone, and I don't know him. I have known her a number of years, but she has been remarried and I don't know what he does. [126]

The Court: Maybe he is looking askance at you. Did you ever meet him?

(Testimony of Charles A. Rolley.)

A. No, sir, I haven't. He is afraid of lawsuits, or something, I think.

Mr. Hutchinson: Q. You continued in your retail trade until what time? When did you start selling to other stores? A. In 1943.

Q. In the meantime had you moved from 212 Stockton Street?

A. Yes, I had. We moved to 239 Geary. We have moved several times since, but from 212 Stockton we moved to 239 Geary Street, again upstairs.

Q. Had you moved again after that before you started wholesale? A. Yes, 108 Geary Street.

Q. Was that a street level shop?

A. That was a street level shop.

Q. Were you still engaged in the dye works at that time? A. No, I gave it up then.

Q. What year was that? A. 1943.

Q. From 1943 on you personally engaged exclusively in the perfume business, is that correct?

A. Yes. Pardon me, during the war I worked nights in the shipyard, too, for a year.

Q. But as far as business activities, as such?

A. Yes.

Q. They were exclusively in the perfume business? A. Yes.

Q. You started your wholesale shop at that place, or did you take another place for that?

A. We took another place for that shortly thereafter.

Q. Where was that? A. 365 Sutter Street.

Q. And you there had a plant for manufacturing the perfume, is that right?

(Testimony of Charles A. Rolley.)

A. Yes. We had in the front a small retail outlet, but had a pretty good area in the rear which we used for our manufacturing.

Q. Subsequently you took up another address on Mission Street, is that correct?

A. That is only a little over 3½ years ago we moved our manufacturing over to 718 Mission.

Q. During this period in which you were engaged exclusively, personally, in this business, a solely owned corporation, had you continued to use the name Voodoo and to have for sale a product which you then identified by that name?

Mr. McKnight: That is objected to as not clear. I don't understand the question. Will you make it more specific please?

Mr. Hutchinson: Well, perhaps we can make it more specific. [128]

Mr. Hutchinson: Q. As I recall your testimony up to this time, you started using Voodoo in conjunction with a particular perfume as one of your trade names in 1934 or 1935 at the latest? Did you continue to use it in connection with your business in relation to a perfume from then until the incorporation of your present company?

A. Yes, we have used it until now, and continuing it.

Q. In fact, you are still using it?

A. Still using it.

Q. At the time of the incorporation did you transfer to the corporation all rights you had in the perfume business, names, and other things?

(Testimony of Charles A. Rolley.)

A. I transferred all formulas, all rights, and all copyrights, equipment, everything.

Q. Since that time, if I understood your earlier reply, the company has continued to use the name and sell it in conjunction with perfumes, colognes and creams, other cosmetics, is that correct?

A. Perfumes, colognes, body talc, bath oil. sachet and hand lotions. [129]

* * * * *

Q. Then if I understand it straight, your Voodoo product was used in conjunction with perfume and cologne from 1934 or 1935, at the latest, to date, and with regard to sachets and body talcs, how long?

A. Perfumes, I used it first in perfumes only for a few years, when we expanded into colognes, then it was in 1942, I guess, we went into light body talc and sachets.

Q. And the creams at a later date? Did you use Voodoo in conjunction with them?

A. No, in creams there is no connection with fragrance at all. [130]

* * * * *

Mr. Hutchinson: Q. Mr. Rolley, prior to the year 1949 did you ever see the name Voodoo advertised in conjunction with cosmetics, including perfumes, other than in conjunction with your own business? A. No, never.

Q. Did your customers, wholesale or retail, ever advise you and inform you that any such product was on the market by any other person? Prior to 1949, I am referring to.

(Testimony of Charles A. Rolley.)

A. They didn't advise me of the product being on the market. They advised me of their never having heard of it prior to that time.

Q. You mean subsequent to that time?

A. Pardon me?

Q. They subsequently so advised you, subsequent to 1949?

A. They advised me of that after the first ad I seen of Dana's advertising Voodoo.

Q. You then made inquiry of your customers and other persons on that subject?

A. Yes, I did.

Q. When did you first become aware of any product being [131] sold, that is in that field, by the name Voodoo other than your own?

A. About a week before Christmas in 1949.

Q. And where and what did you see in that connection?

A. I saw an ad in the women's section of the San Francisco Examiner, the Sunday paper. It was an ad by I. Magnin & Company.

Q. I believe we have a copy of that ad if I can locate it. Did you retain the ad, do you recall?

A. I don't have it at present. I cut it out at that time.

Q. 1949 in December, eh? This particular one isn't marked. I assume you are familiar with the advertisement, counsel? (Handing document to counsel.)

I will ask you if you can identify this advertisement as one you saw?

(Testimony of Charles A. Rolley.)

A. May I have my glasses, please?

Q. Yes. A. Yes, this is it.

Q. Did you see that the latter part of December —did you say the 28th?—1949?

A. Just before Christmas in 1949. [132]

* * * * *

The Court: What did you, yourself, do, if anything?

A. After I contacted the stores and called up like Meier & Frank in Portland, and made full inquiry to convince myself that I felt I was in the right on the thing, I wrote a letter to Dana, Incorporated, at Chicago, calling attention to the fact [133] that I had been using the name Voodoo on perfume for a good number of years.

Q. I show you now, Mr. Rolley, what purports to be a carbon copy of a letter bearing the date December 28, 1949, addressed to Dana, Inc., 200 East Illinois, Chicago, Illinois, and ask if you if you can identify that as a letter—copy of a letter written by you. A. Yes, I wrote this.

Q. Is that the letter you wrote to Dana that you just referred to?

A. That is a copy of it.

Q. This is your carbon copy?

A. Carbon copy.

Mr. Hutchinson: If the Court please, at this time we will offer carbon copy identified as Cross-complainant's and defendant's next in order.

Mr. McKnight: No objection.

The Court: It may be admitted and marked.

(Testimony of Charles A. Rolley.)

The Clerk: Defendant's Exhibit B admitted and filed in evidence.

(Letter dated Dec. 28, 1949, was received in evidence and marked Defendant's Exhibit B.)

Mr. Hutchinson: If the Court please, I think it may be deemed read and we can read it in the argument if need be, and the Court may have it before it. [134]

The Court: It will be copied by the reporter, if necessary.

Mr. Hutchinson: Q. Did you subsequently receive any communication to that letter?

A. Yes, I did.

Q. I show you what purports to be a letter of Dana, and some further name which is in small print, dated the 29th of December, 1949, addressed to Mr. C. A. Rolley, San Francisco, apparently having the name signed "J. D. Gaumer," and ask you received that letter subsequent to the 29th of December, 1949?

A. Yes, I recall seeing this.

Mr. Hutchinson: I will offer this letter in evidence as next in order for the Cross-complainant and defendant.

Mr. McKnight: No objection.

The Court: Let it be admitted and marked.

The Clerk: Defendant's Exhibit C admitted and filed in evidence.

(The letter dated Dec. 29, 1949, from Gaumer to Rolley, was received in evidence and marked Defendant's Exhibit C.)

(Testimony of Charles A. Rolley.)

Mr. Hutchinson: Q. Did you reply to that communication, or did you receive any other communication prior to your further reply?

A. Well, there was further correspondence on both sides since that particular letter. [135]

Q. I believe the letter you just identified, which is Cross-defendant's 2, referred to further correspondence by Mr. McKnight, did it not?

A. They said in their letter their attorney was out of town, and would I please wait until he got back in town, and they would contact me again on it.

Mr. McKnight: Your Honor, as to this point I think Mr. Hutchinson is trying to show notice was given our client in regard to the claim of Rolley, Inc., and I think any further correspondence after the notice is incompetent, irrelevant and immaterial. I don't think it has anything to do with this proceeding, especially anything that might have to do with the subject of settlement by either side.

Mr. Hutchinson: It strikes us, your Honor, that a closely connected series of correspondence should all be received, and we have already received the beginning without objection, and subsequent correspondence had is all part of the same transaction. I don't know that there is any particular reference to settlement. There is discussion of that, but I don't think that is a thing that will make any particular difference to the Court in reaching a decision.

The Court: This correspondence is already in

(Testimony of Charles A. Rolley.)
the record. I will permit anything in relation to that to go in.

Mr. Hutchinson: Q. I show you, then, Mr. Rolley, a letter dated December 30, 1949, on the letterhead of MacKay & [136] Comstock, Law Offices in Chicago, Illinois, signed by James R. McKnight, and ask you if you received that letter shortly after recipt of the letter you have last identified?

A. Yes, I recall getting that.

Q. And subsequently you replied, I believe, on or about the 5th of January, 1950, by a letter which I now show you a carbon copy of, and ask you if you can identify that as your letter to this law firm?

A. Yes, this is my carbon copy of a letter I wrote to them.

Mr. Hutchinson: At this time I will offer the letter dated December 30, 1949, on the letterhead of McKnight & Comstock as cross-complainants next in order.

The Court: It may be admitted and marked.

* * * * * [137]

Mr. Hutchinson: Q. Mr. Rolley, following the correspondence that has just been identified by dates, you requested your counsel to take over the matter, is that correct?

A. Yes, I went to an attorney.

Q. Now, prior to the advertisement you referred to in the San Francisco Examiner just before Christmas in 1949, had you seen any advertisement for a perfume by the name of Voodoo other than

(Testimony of Charles A. Rolley.)

your own in any advertising media coming to your attention? A. Never.

Q. Did you, during those times examine ads relating to the perfumes in newspapers and magazines?

A. I always read Vogue and Harpers and the newspapers of San Francisco, and I read all advertising that in any way might pertain to my work or my business.

Q. Now, has Rolley, Inc., done any advertising in national magazines at any time of its perfumes?

A. Yes, we have.

Q. What national magazines have carried the advertising of your company? A. Vogue.

Q. Any others?

A. That is the only national magazine that I can recall.

Q. You have advertised in the newspapers, have you not? A. Oh, yes, quite a bit.

Q. You have referred in your testimony here and in your deposition to a number of price lists and things of that nature. Did you treat those and use them as advertising media? A. Well, yes.

Q. And that was disseminated to customers and prospective customers, isn't that correct?

A. Yes, that is right. I felt, and we still do, price lists are valuable because we get a lot of tourist trade here and we get a lot of orders then from all over the United States, mail orders.

Q. Do you have at the present time any of the products you sell under the name Voodoo?

(Testimony of Charles A. Rolley.)

A. Oh, yes.

Q. I show you here a number of parcels which were delivered to me earlier this afternoon, and I will ask you if you can identify for us these objects? Would you like to see them, counsel? (Showing items to counsel.) I show you first a carton containing a bottle and a nearly clear liquid, bearing name Rolley, and then expression "Double Rich Cologne," and ask you if you can identify the bottle, the [144] carton, and the contents? A. Yes, I can.

Q. What are they?

A. This is a two-ounce bottle of Voodoo cologne.

Q. That is, the contents of that bottle is cologne under Voodoo, is that correct?

A. That is right.

Q. That is what you have been selling and manufacturing under that name? A. Yes.

Q. This is taken from your stock?

A. Yes.

Q. And the bottle, carton, and so on, are the type of wrapping or container in which you sell this product? A. That is right.

* * * * *

Mr. Hutchinson: Q. I show you a second carton, Mr. Rolley, somewhat larger, bearing the same general designation, [145] and ask you if that is another container you used in a different size for your Voodoo cologne? A. Yes, it is.

The Court: How many ounces is that?

A. Four.

* * * * *

(Testimony of Charles A. Rolley.)

Mr. Hutchinson: I now show you, Mr. Rolley, a carton, bottle and contents of the bottle of a somewhat yellower than clear color, and ask you if you can identify that?

A. Yes, this is the bath oil in Voodoo fragrance.

Q. This was the form in which you sell the product under the name Voodoo, is that right?

A. Yes. [146]

* * * * *

Mr. Hutchinson: Q. The exhibits you have just examined, Mr. Rolley, are the type of product you have been selling throughout the years, as you have described, under the name Voodoo, is that correct?

A. Yes.

Q. And they have been packaged more or less in this manner, and labeled "Rolley" in the manner here indicated ever since you have started making and selling it? [148]

A. In the very beginning we didn't use containers. We sold the bottle without the carton, then later on we boxed them.

Q. In other words, you were labeling these, attached the labels to your own containers in your own shop? A. That is right.

Q. And that has been true ever since you started? A. Yes.

Q. Now, referring to your sales at wholesale after you commenced the wholesale of your product, Mr. Rolley, before you sold your rights to the company and since, did you have orders which you received and billings and that sort of thing, shipping documents of one sort and another?

(Testimony of Charles A. Rolley.)

A. Prior to the incorporation?

Q. Yes. A. Yes, sir.

Q. And since that time the company has had, is that true? A. Yes, sir.

Q. I show you here a number of items which I take to be of that nature, and ask you if you can identify the exhibit. Counsel has examined the same. First, some materials bearing the year 1943. While counsel is examining those documents, Mr. Rolley, in your billings did you frequently use numbers for all your products?

A. In billing wholesale we invariably used the stock number. [149]

Q. And that number is the number you used for your inventory and identifying the product all the way through your operation, is that true?

A. Yes.

Q. Some of the billings here would bear those numbers in addition, and sometimes without the addition of a nume? A. That is right.

Q. Did you have any number which identified the Voodoo product? A. No. 54.

Q. Has that been consistent from the beginning?

A. Yes.

A. The pending question was, Mr. Rolley, whether you could identify these materials which I gave you, or which I now show you, as being examples of billings or orders or both during the year 1943, which I take it would be your individual business?

A. Yes, these are copies of invoices that we made

(Testimony of Charles A. Rolley.)
out at the time we shipped to the various concerns these various perfumes.

Q. I note that there are some notations of one sort and another, apparently adding machine tapes, memorandum of one kind and another. Those did not relate specifically to the order or billing, but were inter-office notations?

A. That is right. That is just our file. I found them in [150] the files.

Mr. Hutchinson: At this time, if the Court please, I will remove, and counsel may examine, as I remove them, some rough notes that appear to be of that nature; and offer as defendant's exhibit next in order this collection of such billings bearing the year date 1943. I think it might be as convenient as any other way to leave these in the volume, your Honor, to avoid confusing them.

The Court: It may be admitted and marked.

The Clerk: Defendant's Exhibit X admitted and filed in evidence.

(Volume of billings dated 1943 received in evidence and marked Defendant's Exhibit X.)

Mr. Hutchinson: Q. I show you now a volume containing a number of similar items bearing the year date 1944, consisting of orders received from other firms, and your billings of the same general nature, and ask you to identify them?

A. Well, these are original orders made out by purchasers from Portland, Oregon, and Honolulu and various other places; also copies of invoices

(Testimony of Charles A. Rolley.)
made out by Rolley when we shipped the merchandise to them.

Q. Those are business records of your company for the year 1944, is that correct?

A. Yes. They were taken out of our file.

Mr. McKnight: Your Honor, a great mass of this has to [151] with products other than those which are involved in this case, and I presume you are limiting your questions to No. 54, which is the numerical counterpart for Voodoo, is that correct?

Mr. Hutchinson: I am limiting them to Voodoo, which appears frequently, and 54.

Mr. McKnight: 54 is the number which means Voodoo to customers. The rest of them we object to as incompetent, irrelevant and immaterial.

Mr. Hutchinson: We are not suggesting they relate to other products and material, but we know no other way to do it.

The Court: Limited to No. 54?

Mr. Hutchinson: Yes, No. 54 and Voodoo, your Honor.

* * * * *

Mr. Hutchinson: Q. Before leaving the year 1944, you also had correspondence in which you referred to the product Voodoo, did you not, that is, your product sold as Voodoo? A. Yes.

Q. Did you at various times put out this type of price list that you have indicated? [152]

A. Yes.

Q. I show you one here that does not bear a date,

(Testimony of Charles A. Rolley.)

and ask if you if it was used by you and, if so, when; that is, you or your company?

Mr. McKnight: Your Honor, I think it should be tied down as to date, if we can.

Mr. Hutchinson: I am asking if he used it, and I will narrow the focus, counsel?

A. We used it, and I can't be sure of the exact time when we used this, because we have had several printings of price lists. But it states here, "108 Geary Street," so that was in 1943. The sales tax is 2½ per cent, and that naturally was prior to the time the State raised the sales tax. So, due to the address on here, I would say it is 1943.

* * * * *

Mr. Hutchinson: Q. I show you a file dealing with 1945, [153] which purports to contain copies of billings, orders, and the like, of a similar nature to those earlier shown you, and I will ask you if those are of the same type and relate to the same subject with regard to the year 1945?

A. Yes, they are. [154]

* * * * *

Mr. Hutchinson: Q. Mr. Rolley, I show you what purports to be a billing invoice to K. P. Hunn, I believe is the name, March 18, 1947, and ask you if you can identify that?

A. Yes. That is a copy of our invoice to them.

Q. Your office copy? A. Yes.

Q. There are no names listed there. Under stock number I notice some numbers. Can you identify those relating to Voodoo?

(Testimony of Charles A. Rolley.)

A. No. 54-P, meaning "perfume," and wherever you see a "P" means perfume and "C" means cologne.

Q. 54-P—— A. Would be Voodoo.

Q. Shipped at those prices on that date to the Sacramento purchasers, is that right?

A. That is right. [160]

* * * * *

Mr. Hutchinson: Q. I show you a letter on "Washington Office, Inc.," stationery, February 17, 1950, purportedly signed by M. B. Studebaker, and ask if you can identify that?

A. Yes. That is a letter I got ordering a bottle of Voodoo perfume from Mrs. Studebaker at that time.

Q. Was that order filled?

A. Yes, it was. It is noted on the top corner.

Q. Some pencil handwriting in the upper left hand corner?

A. Yes. That is our notation so that we know it is done. It says "Filled", date and my initial.

Q. 2/25/50. Is that the date you filled the order?

A. That is right.

* * * * *

Q. Have you examined your records to see how far back your copies of orders and other correspondence on the subject of labels goes?

A. As far back as we can get a record is, I believe, 1943.

Q. I show you a carbon copy of a letter dated June 10, 1944, addressed to the McCoy Label Com-

(Testimony of Charles A. Rolley.)

pany, San Francisco, and ask you if you can identify that document?

A. That is a carbon copy of an order we gave them on that date.

Q. Does that make any reference to Voodoo labels?

A. Yes. It specifies 500 Voodoo labels. [162]

* * * * *

Mr. Hutchinson: Q. I show you a letter addressed to Frederick Biermann, New York City, August 7, 1944, carbon copy apparently thereof, not signed, and ask you if you can identify that document?

A. Yes. That is a carbon copy of an order we placed with this company for blotters that we used for advertising. purposes, and it shows 3000—pardon me, let's see—shows 3000 Voodoo blotters. We used to perfume these and give them out for advertising purposes. [163]

* * * * *

Mr. Hutchinson: Q. I show you, Mr. Rolley, two boxes containing, I believe, labels and ask you if you can identify those? I will open up one of these, if I may. One of these, I believe has been opened, and the other one not. I will ask you to state, if you can, what the boxes contain with respect to labels?

A. Well, they contain labels for Voodoo that we use on all our Voodoo products—perfume, cologne, and the various sundries. This is just—well, you opened this one. Well, I guess that is it.

(Testimony of Charles A. Rolley.)

Q. These contain approximately 1350 numbers, is that correct? A. Each.

Q. Each box?

A. I believe we ordered about 5000 the last time.

* * * * * [164]

Mr. Hutchinson: You may cross examine.

Cross Examination

* * * * *

Q. Were you born in San Francisco?

A. No, I was born in Pennsylvania.

Q. When were you in the shoe dyeing business in San Francisco?

A. From, it was either late 1930 or early 1931 that I started.

Q. Until when? A. Until 1943.

Q. And what did that business consist of? What kind of products did you make or sell?

A. In connection with the dye business?

Q. Yes.

A. Well, we sold—in that particular business we weren't really selling anything, excepting I had a separate room, [165] separate place for perfumes, and my primary business relating to the dye works was the cleaning and dyeing of shoes, bags, gloves, suede garments, and evening slippers, things like that.

Q. So that in 1930 you were making your living in the dyeing business, is that correct?

A. No, in 1930 I was working as a shoe salesman at that time. I at one time had been the manager,

(Testimony of Charles A. Rolley.)
but then, well, when the depression started things got a little rough, so I took whatever kind of job I could get.

Q. Well, when did you begin the shoe dye business here, then?

A. As I say, it was either the latter part of 1930 or early part of 1931. I don't recall the exact date.

Q. From the latter part of 1930 or early part of 1931 up until 1942 you made your living in the shoe dye business, is that correct?

A. No, I didn't make my entire living from it, no.

Q. Made part of it?

A. I made part of my living in that.

Q. The major part of it?

A. In the beginning, yes; then later on I made as much money selling perfumes, then later I made more money selling perfumes, and when I got to that point I gave up the dye business.

Q. At what time did you begin to make more money in the [166] perfume business than in the dye business?

A. That would be pretty hard to answer that question.

Q. Well, you should know that, Mr. Rolley?

A. I really couldn't say. I made more at one time, that is all.

Q. Didn't you file an income tax during that period?

A. Yes, but I didn't specify from whether I made it from selling perfume or from dyeing.

(Testimony of Charles A. Rolley.)

Q. You didn't specify the source of your income in your income tax return?

A. Certainly, but not breakdown from which phase of it. I worked in the shipyards during the war a whole year nights, so I had three things, so I can't tell you from which I made more money. In fact, I used to sell perfume in the shipyard.

Q. Sold them reproductions?

A. I sold them perfumes.

Q. Did you also sell them reproductions of perfumes?

Mr. Hutchinson: Just a minute, I think we will have to object to any reference to reproductions in that sense. You can define it to the witness.

The Court: Reproductions? What does that spell out?

Mr. McKnight: It spells out copies to me. When this gentleman testified in his deposition——

The Court: Ask him the direct question so that there is [167] no doubt about it.

Mr. McKnight: Q. Did you sell copies of other well known perfumes while you were at the shipyards? A. I perhaps did.

Q. Well, did you or did you not, Mr. Rolley?

A. I am pretty sure I did.

Q. Reproductions or copies of what well known perfumes?

A. I don't remember the individual ones at this time. Possibly Shalimar, probably Chanel No. 5. Same thing that all department stores in the United States do. Same thing many of the big perfume

(Testimony of Charles A. Rolley.)

manufacturers do, and still do today. Same thing. You can go into the Emporium right today and have Coty, who are one of the two biggest perfume manufacturers in the world, will sell you or anybody else their interpretation or version of some other perfume. I did no more than the biggest, most honorable perfume makers in the world did and still do.

Q. And you didn't use the names of other well known trademarks?

A. I never used the names of other well known trademarks on a box in my life.

Q. But you did use the names orally?

A. Pardon?

Q. But you did use the names orally?

A. I perhaps did, the same way practically every perfume [168] sales lady in the United States has always and still does, and will do right today down in any of your better stores.

Mr. McKnight: Your Honor, I think this witness should confine himself to what he did and not what anybody else did.

The Court: Limit it to what you did.

A. Yes, your Honor.

Mr. McKnight: Q. You can't tell us at what time you first began to make money in the perfume business, more than the dye business, approximately the year?

A. Well, I would say it would start running equal, oh, about the late 30's or so, and stayed more or less equal. I mean, like in the business, it is seasonal, sometimes more money in the dye works, like

(Testimony of Charles A. Rolley.)
before the opera season I would make more money dyeing evening slippers, then at Christmas time I would make considerably more money selling perfume than in the dye works.

Q. You referred to a Mr. Moreland. How do you spell that? A. M-o-r-e-l-a-n-d.

Q. What is his first name? A. Walter.

Q. What is his address?

A. I don't know his address without looking. In the phone book it is 600 something Post Street. I don't know his personal address. He is with the Florasynth Laboratories here in San Francisco.

Q. He was with the Florasynthe Laboratories at that time?

A. Not at that time. He is with them at this time.

Q. What was he doing then?

A. He was selling for some chemical concern.

Q. What perfume supply house did you first deal with in obtaining your supplies for your perfumes?

A. I got a great deal of my things from van Ameringen HaeBler in New York.

Q. What is the address of that concern, the last one? Is it in San Francisco?

A. No, New York.

Q. Are you dealing with them now?

A. Oh, yes.

Q. Is that the source of your perfume oils and other supplies?

A. They are just one of the concerns.

Q. What is the address of this concern in San

(Testimony of Charles A. Rolley.)

Francisco from which you first purchased supplies?

A. May I ask the young lady down there? I think she will remember.

Q. Certainly.

The Witness: Do you know van Amerigen Hae-Bler's address? It is 57th Street. Do you know the number. That is, it is on 57th Street in New York. I am not sure of the exact number?

Q. I thought you said somewhere you dealt with a concern [170] called Butcher's in San Francisco?

A. Oh, that is in San Francisco. They are jobbing. That is where I first dealt with them. They don't sell perfume oils here. They are merely a representative.

Q. Did you purchase supplies from a jobber?

A. At that time?

Q. Yes. A. Through the jobber.

Q. Through the Butcher's concern?

A. Yes, and I obtained a lot of materials from them they had on hand at that time.

Q. What kind of materials did you buy?

A. Perfume oils. Essential oils.

Q. Will you explain to the Court what you mean by a production of other well known perfumes?

A. By a reproduction of other well know perfumes I mean a fragrance that I interpret according to my own sense of smell and match it to the best of my ability according to my own sense of smell.

Q. Would you say people would come to you and ask you to make your interpretation of Shalimar?

(Testimony of Charles A. Rolley.)

A. They did that at one time. We don't go into that any more and haven't for years.

Q. But at one time you did duplicate any well known trademarked perfume, is that right? [171]

A. You bring me a bottle of perfume in a plain bottle, I wouldn't know the name of it.

Q. They didn't do that, did they?

A. Sometimes.

Q. Did they say it was a famous name?

A. Sometimes, and sometimes merely bring in the almost empty bottle.

Q. Give me the name and address of any person who ever brought in a plain bottle and asked you to duplicate it, forgetting the name?

A. I couldn't tell you the name and address of one that brought me a bottle with the name on it. That is going back a good many years. That would be impossible for me to remember at this time.

Q. Would you say that these perfumes, so-called reproductions, were intended as copies of other well know perfumes?

A. In a great many cases, yes.

Q. Didn't these well known perfumes have famous trademarks? A. Yes.

Q. And the people wanted perfumes that had the most famous trademarks, didn't they?

A. They wouldn't have come to me if they had. They could have gone to Magnin's and bought them, or any other store. I never once in my life ever misrepresented to a customer anything I did or sold.

Q. But you put out a list of famous perfumes

(Testimony of Charles A. Rolley.)

with the names of well known trademarks on that lists, didn't you? A. That is correct.

Q. I show you Exhibit 1, and ask you if that is a list put out by you? A. Yes, it is.

Q. Has names of famous trademarks on there, doesn't it?

A. No, not to my knowledge at that time it didn't, not a one.

Q. You do see the words "Rolley Reproductions" up there? A. Oh, yes.

Q. And those perfumes constituted a large portion of your business at that time?

A. No, sir. I would say in the late 30's I started to concentrate on my own individual creations, and the largest portion of my business in perfumes since some time around 1940 has been around True Daphne which is an original creation of mine, and is my biggest selling perfume and which I am told three or four of the large perfume companies have tried to copy.

Q. Until 1940, however, your main business was in the reproduction of perfumes or best sellers of other concerns, wasn't it?

A. No, sir, I didn't say that.

Q. That is the fact, isn't it? [173]

A. No, it isn't the fact.

Q. Did you ever copy Tabu perfume?

A. I have copied Tabu. I have copied about 200 different perfumes in my experiments.

Q. Did you ever have anybody come to you with

(Testimony of Charles A. Rolley.)

Tabu perfume and ask you to make a reproduction of it? A. No, sir.

Q. But you have copied it?

A. I have copied about 200 different perfumes in my experiments.

Q. This Meiers & Frank in Portland, Oregon, did you have a demonstration booth there at one time? A. Yes, sir, we did.

Q. What time?

A. I don't recall off handed whether it was late —no, it was early 1944, I believe, we started there.

Q. And were you selling reproductions at that time?

A. As reproductions, no, sir.

Q. As a matter of fact, weren't you asked to remove your demonstration booth from Meier & Frank's store because you were selling reproductions of well known famous perfumes?

A. That is absolutely untrue; and if I may say so, I believe you know it is untrue.

Q. Did the Toilet Goods Association attorney come to you and ask you to discontinue the sale of reproductions of well [164] known and famous trademarks perfumes?

A. I don't know whether the Toilet Goods Association or who it was. At one time in 1943 it was Mr. Brown, who was District Attorney, I went down to his office. Some attorney asked me to come down there and I did, and that—Mr. Brown and some of these attorneys questioned me, and they asked me why I was doing this, and I told them I had gone

(Testimony of Charles A. Rolley.)

to the Federal Building here and asked them all about labels, I thought that was the procedure, I didn't want to do anything wrong, and the Federal Government told me what I was doing was perfectly all right, so far as they were concerned, as long as I didn't make any untruthful statement.

I explained that, and Mr. Brown told me about three or four months before there had been a new amendment passed that made it illegal to use comparisons like I was doing, that is, to refer to any other name on a printed sheet of paper; and that prior to that time it was all right, but inasmuch as there had been the new law only three or four months, he could understand why I wouldn't be aware of it, and asked me what I intended to do about it, and I told them, "I will do whatever is right."

They asked me to destroy or get rid of those particular copies of papers you have had in evidence here, and they wanted me to do it in 24 hours. I asked them if they would please give me at least one week, and they agreed to that, and in one [175] week we had complied with the request 100 per cent, and since that time I have never had the slightest difficulty with anyone. In fact, I was invited to become a member of the Toilet Goods Association.

Q. That was in 1943 you had that conference with the United States District Attorney here?

A. No, San Francisco City Attorney. City and County Attorney General.

(Testimony of Charles A. Rolley.)

Q. Did he tell you that was a state trademark violation? A. No, sir, he did not.

Q. What did he tell you or advise you?

A. He told me about two or three months before they had passed this amendment in the State of California and that it was referred to as—now,—then referred to as Unfair Business Practice, if that is the correct word.

Q. Did you receive any notice from any other attorney or have any conference with attorneys for any perfume concerns prior to that time?

A. No, sir.

Q. Hadn't you been warned by another concern not to use their trademark? A. Never.

Q. How did you happen to go to Mr. Brown's office?

A. I got a subpoena from the Food & Drug of the State of California through—not the Attorney General, the District [176] Attorney.

Q. Up until 1943, then, you had used names of famous perfumes on lists?

A. On lists only.

Q. In connection with the sale of your perfumes, is that correct?

A. That is correct. I admit that.

Q. And did you use the trademarks of plaintiff in that list?

A. You mean—by the plaintiff——

Q. Did you use a trademark "Forbidden" in any way?

A. I don't know. Never has "Forbidden." I

(Testimony of Charles A. Rolley.)
don't admit here that is a property of Dana, Inc. I never used the word "Tabu" in my life.

Q. Did you use the word "Forbidden" in any conjunction?

A. I used the words "Forbidden Flame," yes.

Q. And you used that in connection with the sale of perfumes of yours?

A. That is right, and I believe that was long before "Forbidden" was ever registered or used in connection with the Tabu perfume.

Q. That Forbidden Flame wasn't a perfume you acquired from the predecessor? A. No.

Q. It was your own perfume?

A. That is correct. [177]

Q. So that you didn't stop using the names of famous trademarks of other companies until 1943, is that correct?

Mr. Hutchinson: I don't think that is the evidence. We object on the ground that it is argumentative.

The Court: Develop the facts, whatever they may be. That question is too general.

Mr. McKnight: Q. So that until 1943 you used a list in which the names of famous perfumes appear, is that correct? A. That is right.

Q. And you stopped that in 1943?

A. That is right.

Q. What was Forbidden Flame a copy of, what perfume? A. Tou Jouirs Moi.

Q. As a matter of fact, it was a copy of Tabu, wasn't it? A. That is false.

Q. You testified on your discovery deposition

(Testimony of Charles A. Rolley.)
that Forbidden Flame had an oriental fragrance, did you not? A. Yes.

Q. A strong fragrance? A. Yes.

Q. And it is well known that Tabu has a strong, oriental fragrance?

A. Oh, yes, but there are dozen of them have strong oriental fragrances, and they are no more alike than, well, red pepper and—and salt. [178]

Q. They are alike in that both are oriental and both are strong, aren't they?

A. That is correct, but there are dozens and dozens of heavy oriental perfumes on the market and still none could be construed as being alike. It is like saying——

Q. (Interposing) Do you mean to tell me Tou Jouirs Moi is a heavy oriental fragrance?

A. I consider it heavier than Tabu.

Q. As a matter of fact, it is a floral fragrance, isn't it?

A. As a matter of fact, it isn't a floral fragrance. It hasn't the slightest relation with floral. It is one of the heaviest perfumes ever put on the market.

Q. Who bought Forever perfume from you in 1934?

A. Oh, I don't know who bought Forever perfume from me in 1934.

Q. 1935? A. No, I wouldn't.

Q. 1936? A. I don't remember, sir.

Q. Can you give me the name of anyone who bought Forever perfume from you in the '30's?

(Testimony of Charles A. Rolley.)

A. No, sir, I can't at this time.

Q. Can you tell me anyone who bought Garden Pink perfume from you in the '30s, any purchaser at all? A. Not offhanded, no, sir. [179]

Q. You certainly would remember the names of your early purchasers, shouldn't you?

A. No, sir, I could not. After all——

Q. (Interposing) Wouldn't you say I should remember the names of my first clients?

A. That, I think, is a little different. I can remember Mrs. Coffey, as I mentioned before, very well, because she came in many, many times, and there are a good many reasons. I can't even remember off-handed the first employee I hired in the business. I am sorry, I can't.

Q. Can you give us the name of anyone who bought Red Red Rose perfume from you in the '30's? A. Yes, sir, I can remember that.

Q. Without referring to any information, suppose you give it to us orally?

A. Well, she has been married three times since, and I forgot her name yesterday. Her first name is Vera.

Q. That is the lady in Sacramento?

A. Yes.

Q. Was she connected with the Merle Norman Studio? A. No.

Q. Ever been? A. No, sir.

Q. Did she ever purchase from you to resell?

A. No, sir. [180]

Q. The only people that you have told us about

(Testimony of Charles A. Rolley.)
that bought Voodoo perfume or cologne from you prior to 1945 are Mrs. Coffey and another woman whose name you only recall as a first name?

A. I can tell you more now.

Q. But you couldn't tell us any more on direct examination? Those were the only ones?

A. At that time that is all I could, because when I went down there for this deposition I wasn't prepared, didn't know what I was going to be asked, and I didn't know what records to look up.

The Court: Do you know now?

A. Yes, sir.

The Court: Tell us the names.

Mr. McKnight: Q. And addresses?

A. Well, I can't give you addresses. I will any time if you let me look in the book.

Q. No, I would like to have you testify orally.

A. Mrs. Wriggley. She bought in 1940 or so.

Q. Where was she from?

A. San Francisco. She is in the court room now.

Q. Who else? A. And a Mrs. Shaden.

Q. How did you happen to contact Mrs. Wriggley?

A. Well, people come into my shop and see my beautiful [181] shop now, and see all the advertising we are doing and just sort of take an interest and say, "I remember when you had this little dye shop upstairs, had your shoe store. I used to buy perfume from you then."

Since this happened over a year ago, whenever they started talking to me like that I would take

(Testimony of Charles A. Rolley.)

an interest, ask them, "How far back do you remember me and remember some of the things I had," or they bought from me. But prior to that time I had no interest, just customers being pleasant, and I saw no reason to go in and ask them where they lived, or their names and everything.

Q. Now, when you signed the answer to the Complaint in this case you signed it under oath, didn't you? A. Yes, sir.

Q. Mr. Rolley, I call you attention to the answer filed by your company in this case and ask you if that is your signature? A. Yes, it is.

Q. In this answer do you remember stating that you first used the trademark Voodoo on April 15, 1940? A. Would you repeat that, sir?

Mr. McKnight: Will you please read the question?

(Question read by the reporter.)

A. To the best of my ability, yes, sir, I remember answering that at that time that is as far back as my information went. [182] I hadn't searched any further.

Q. And you did state that under oath?

A. Oh, yes. Yes, that was the truth at that time.

Q. And in your discovery deposition—strike that. How did you fix April 15, 1940, as the date?

A. Because that is the only proof that I had in my own mind at that time, and I wasn't going to make a statement in that deposition under oath that I wasn't sure of at the time.

Q. And at that time you swore to that as the

(Testimony of Charles A. Rolley.)

truth, the whole truth, and nothing but the truth, isn't that a fact?

A. That is correct. That was the truth to the best of my knowledge at that time.

Q. And yet in your discovery deposition, which was taken some time—which was taken on October 9, 1950, you then stated you had first used the trademark Voodoo on perfume in 1938, isn't that correct?

A. Aren't you talking about the same thing, Mr. McKnight?

Q. No, the first paper I showed you was the answer which you filed in this case.

The Court: The attorneys filed the pleadings in this case. Now he is talking about a deposition.

A. Oh, oh, I see.

Mr. Hutchinson: Can you give us the reference, counsel?

The Court: Page?

Mr. McKnight: Q. On pages 20 and 21 didn't you [183] originally testify when asked, "Now, when did you first use the trademark Voodoo on or in connection with perfume or colognes," didn't you testify "Some time in 1938"?

A. May I ask what the date of that was and the date of this?

Q. Mr. Rolley, I call your attention to the answer which you filed in this case, and ask you what date is shown there by the Notary?

A. June, 1950.

(Testimony of Charles A. Rolley.)

Q. And that is your signature at that time, is it? A. Yes, sir.

The Court: Now indicate the date of the deposition.

Mr. McKnight: Q. Now, the date that you gave your deposition was the 9th of October, 1950, wasn't it? A. That is correct, sir.

Q. Between June, when you signed the answer, and October, when you gave your deposition you had talked with your counsel, hadn't you?

A. Oh, yes.

Q. And you had seen the trademark registration of the plaintiff for Voodoo? A. Yes, sir.

Q. At the time that you gave your answer in this case in June, had you seen the registration of Voodoo of the plaintiff? A. No, sir.

Q. But after you had signed your answer, you then saw the [184] registration? A. Yes, sir.

Q. And before the time that you testified in your discovery deposition? A. Yes, sir.

Q. Does that explain why you stated that you had used Voodoo in one instance in 1940 and in the later time in 1938?

A. Do you want me to explain that?

Q. I want you to answer the question.

The Court: Answer the question, then you may explain it.

A. I don't know just——

The Court: Read the question.

(Question read by reporter.)

(Testimony of Charles A. Rolley.)

A. It is hard for me to answer the question. It is like asking when I stopped beating my wife. I would have to explain it in order to answer it.

Mr. McKnight: Weren't you trying to get ahead of the date of registration?

A. Why, certainly. May I explain it now?

Q. As a matter of fact, didn't you tell the truth——

The Court: Your attorney will develop it.

A. I am sorry.

Mr. McKnight: Q. As a matter of fact, didn't you tell the truth the first time, when you signed the answer under oath [185] and you alleged the date you first used Voodoo was 1940?

A. To the best of my knowledge, that was as far back a my knowledge went at that time. I made further investigation afterwards. In fact, only two weeks ago I got further information and further proof, and documentary proof, that would refresh my memory, that would take me further back.

Q. When you signed the deposition, you then alleged that you had first used the trademark Voodoo on perfume in 1933, isn't that correct?

A. Yes, sir. Well——

Mr. Hutchinson: 1935.

A. Whatever it says there.

Mr. McKnight: 1935?

Mr. Hutchinson: Page 21.

Mr. McKnight: Q. Page 21, you allege the date 1935.

Mr. Hutchinson: Counsel, I think it is only fair

(Testimony of Charles A. Rolley.)

if you show the witness what you were asking, and ask if he stated that.

Mr. McKnight: This is cross examination.

Mr. Hutchinson. I know.

Mr. McKnight: This is his own product. He should know as well as I know the addresses of my clients.

Mr. Hutchinson: If the Court please, we will have to object to the pending question and others like it on the ground no proper cross examination. This apparently is [186] intended as impeachment, and it is required the witness be shown what he is claimed to have said at another time.

The Court: You may show him the deposition and cross examine him on it.

Mr. McKnight: Q. When you signed the deposition did you state that you had first used Voodoo in 1935 and possibly 1936, as shown on page 30 (handing document to witness)?

A. Yes, that is right.

Q. So that you first come out and say you used Voodoo in 1940 in a sworn answer. You then give a deposition in which you allege 1938, and then when you go to sign the deposition you date it again back to 1935 or 1934, is that all true?

A. That is true.

Q. The reason you keep dating back, to help you in every way you possibly can?

Mr. Hutchinson: We object on the ground that is entirely argumentative, your Honor.

The Court: Objection sustained.

(Testimony of Charles A. Rolley.)

Mr. McKnight: Q. In your discovery deposition, on page 21, which I will show you, didn't you first state under oath you went into the perfume business in the early part of 1938?

A. No, I signed 1933.

Q. But you testified 1938, didn't you?

A. That is what I thought at the time, and subsequently I [187] was able to go back and prove positively the earlier date.

Q. You made a mistake of five years?

A. That is very possible. That is very possible. You see——

Q. (Interposing) The perfume business was very important to you, wasn't it, and has been?

A. Everything at that time was very important to me.

Q. But you said 1938? It wasn't a matter of surprise, was it, at the time the question was asked?

A. At the time that is as far as my memory went. You see, I never thought it was necessary at all to go beyond, actually, 1948, so I didn't make much effort to go beyond that because your first use, or, your client's first use for naming a perfume, use of the word Voodoo, was in 1948.

Q. You don't know that as a matter of fact, do you? A. That is all they offered me.

Q. You don't know that, do you?

A. That is all they offered me, and I accepted your word.

Q. Didn't you see the date of the registration?

A. I didn't see it until some time later. Up

(Testimony of Charles A. Rolley.)
until that time I merely accepted your word completely. You were going to settle this thing to my entire satisfaction. You even advised me not to see an attorney, until I got so confused by the continuous correspondence, I got frightened that you were trying to make, as many people told me, a sucker out of me. [188]

Q. Who told you that?

A. Many people in the industry.

Q. Name one in the industry?

A. Why should I implicate them?

Q. You are testifying under oath. Back up that statement and give me the name and address of anybody that made that statement or withdraw that.

Mr. Hutchinson: That is not a proper question.

Mr. McKnight: It is—making a gratuitous statement like that, then when comes cross examination, he hides.

Mr. Hutchinson: We have tried, if the Court please, to let this interrogation go on without objection because this witness is a key witness for the cross complainant as well as the defendant, but we think there is some limit, and this is so highly argumentative I think counsel should be instructed to query the witness as to the facts.

Mr. McKnight: I think the argumentativeness has come from the gratuitous, voluntary statement of the witness.

The Court: We will have to label it as gossip, anyway.

(Testimony of Charles A. Rolley.)

Mr. Hutchinson: Move to strike it, if it isn't responsive.

Mr. McKnight: I don't think it should be stricken. That should be in the record for the Court to see and remember, and for what it is worth to show the character of this witness.

Q. Now, then, I want to call your attention to Plaintiff's Exhibit 86 and ask you if that is the product of the defendant? [189]

A. Yes. If I remember right, you bought this in my shop.

Q. Does it bear the trademark Voodoo on the bottle? A. Yes, sir, it does.

Q. Did you sell any Voodoo perfume or cologne outside of San Francisco prior to 1940?

A. Not prior to 1943 except perhaps mail orders, that is, retail mail orders.

Q. But you don't have any record of any sales of Voodoo perfume or cologne outside of San Francisco prior to 1943? A. No, sir.

Q. I call your attention to a document, which I would like to have the Clerk mark for identification Plaintiff's Exhibit 101.

(Document was marked Plaintiff's Exhibit No. 101 for identification.)

Mr. McKnight: (Continuing) Q. And ask you if the advertisement in the lower left-hand corner is your advertisement?

A. Yes, sir, it is.

Q. That is the advertisement of the defendant?

(Testimony of Charles A. Rolley.)

A. Yes, sir.

Q. And is Voodoo perfume advertised there?

A. Yes, sir.

Q. You offered to give away a sample free, don't you, in that advertisement? [190]

A. We offered to give it in conjunction with the purchase of another product, a small sample bottle.

Q. In other words, you are advertising?——

A. Sea and Ski Hand Cream.

Q. And with that for a dollar you gave a jar of this Sea and Ski Hand Cream and also gave free a bottle of Voodoo?

A. Well, your wording is confusing.

The Court: Read it.

A. We don't give the hand cream. We sell the hand cream.

Mr. McKnight: Q. And in addition to that——?

A. With the hand cream comes a small bottle of Voodoo perfume. The purpose, we are trying to increase or introduce the new hand cream and get as wide a market as possible on it.

Q. Does that indicate your Voodoo perfume is a poor seller? A. Not necessarily, no.

Q. Have you ever done any advertising of Voodoo perfume in San Francisco papers outside of this?

A. I may have a number of years ago, but not for quite some time.

Q. This ad appeared in the San Francisco Chronicle September 27, 1951, is that correct?

(Testimony of Charles A. Rolley.)

A. That is correct.

Q. You don't have any other advertisements of Voodoo perfume or colognes here at present this morning, do you?

A. Just duplicates of the same ad. [191]

Q. But you had—what was that ad you say you had in Vogue? A. That wasn't Voodoo.

Q What was it?

A. You didn't ask me that, sir. You asked me if we advertised in national magazines.

Q. I thought you had an advertisement of Voodoo in Vogue Magazine?

A. No, sir, we just advertised perfume in general, and asked me did I ever have any. You didn't specify fragrance.

Q. Outside of this ad, Exhibit 101, this morning, you have no other ads of Voodoo perfume?

A. No, sir.

The Court: Pass that up, Mr. Clerk.

Mr. McKnight: I offer in evidence Exhibit 101.

The Court: Let it be admitted and marked.

The Clerk: Plaintiff's Exhibit 101 admitted and filed in evidence.

(Advertisement Sept. 27, 1951, was received in evidence and marked Plaintiff's Exhibit 101.)

Mr. McKnight: Q. What is the extent of your sales for Voodoo perfume for this year?

A. We don't keep records of the sales of every individual perfume. We break down our sales as

(Testimony of Charles A. Rolley.)
perfumes and colognes is one item, as cosmetics is another item, gift taxable, gift non-taxable. [192]

Q. Have you any idea of the total sales of your Voodoo perfume and cologne since the date you first started selling it up to present?

A. No, I would have no idea.

Q. Would it be $1000?

A. It would be in excess of that.

Q. Would it be $100,000?

A. Oh, no, it would be under a thousand——

Q. Would it be under $25,000?

A. Now, I don't know.

Q. Would it be under $50,000?

A. In Voodoo alone?

Q. Yes. A. Oh, yes, it probably would be.

Q. Would it be somewhere between twenty-five and fifty thousand then, is that right?

A. I would only be going by conjecture. I would say yes, but I wouldn't want to be held down to a figure on it.

Q. Are you including the trademark Voodoo in your current price lists of Rolley, Inc.?

A. Pardon?

Mr. McKnight: Will you read that, Mr. Reporter?

(Question read by reporter.)

A. The printer now has an order for new price lists which I have been withholding for about a year, and it specifies Voodoo on it. [193]

Q. How long has your price list been out on which Voodoo has not appeared?

(Testimony of Charles A. Rolley.)

A. You mean how long has it been——

Q. Since you had a price list that had Voodoo listed on it?

A. Oh, sometime within the last, approximately within the last two years.

Q. So that the last two years Voodoo has not appeared on the price list of the defendant?

A. I would not say for the last two years. I say some time within the last two years. I don't know the exact time. I wouldn't sit down and say two years. It might be one and a half or—but it isn't in excess of two years.

Q. Why did you omit the trademark Voodoo from your price list?

Mr. Hutchinson: If the Court please, I think we are wandering far afield, and it is highly repetitious, so at this time I would like to object on the ground this question and others like it are incompetent, irrelevant and immaterial, and outside the issues of this case. I found nothing in the pleadings to suggest that these people have purchased the right here, or that there is any abandonment of anything, or anything of that nature, no allegation of that sort. I cannot imagine why we have to go through all the price lists published in the last two or three years.

Mr. McKnight: I am curious to find out. These people came [194] here with price lists and introduced some of them in evidence, and the price lists for the last year, I would say, two years, do not

(Testimony of Charles A. Rolley.)
include the trademark Voodoo, and I am curious to ascertain why.

The Court: How does that enter into the merits of this case?

Mr. McKnight: I think it is important to show they have no interest in the trademark, and I think it is an indication of abandonment. I don't think they have made any sales in the last two years.

Mr. Hutchinson: Shows sales in 1950.

Mr. McKnight: Some evidence. I am curious——

The Court: Well, he may answer. Why haven't you embodied it in the price lists since that period?

A. The reason why, your Honor, is, one of the reasons is because we bring out new perfumes from time to time. This business is almost like, well, the style business and you, as we call it, sweeten it up once in awhile. If your list gets too long it is like, well, ads with too many words in it. If it is too wordy people won't read it at all. We try to eliminate certain words for a period of time.

And further explanation is for three years my firm was in a very bad financial position, and only until the last June have we come out of it, and we are now on a sound financial basis. I had to curtail a great many of my activities, [195] advertising and things, with the sole purpose of saving my business from bankruptcy, and we couldn't promote, we couldn't advertise all perfumes, so we concentrated our efforts on those which brought us the quickest return.

(Testimony of Charles A. Rolley.)

Anyone in the perfume business knows that you can have a perfume lie dormant from an advertising point of view, then when you are in a position to spend money on it, go promote it.

Another thing, it is seasonal. Some perfumes are better in one season than another.

Mr. McKnight: Q. So you eliminated Voodoo because it was a poor seller, is that correct?

A. Voodoo and half a dozen other of my fragrances have been slow sellers. Whenever we do get one like that I try to find out the reason why. That doesn't mean we abandon the perfume, or anything. It merely means I will endeavor to make some improvement, if possible, in the particular perfume, and then, when I accomplish that, put it out. Like we put all the new perfumes——

Mr. McKnight: I think that is sufficient, your Honor.

A. Well——

Mr. McKnight: Let me have Exhibit B-1.

Q. I call your attention to Defendant's Exhibit B-1 and ask you if there is any date thereon?

A. No, sir. [196]

Q. The word Voodoo of course appears there at the bottom line in two instances, does it not?

A. It says at the top of the first page, "12 Voodoo," and at the bottom it says "6 Voodoo," and on the third page it says "6 Voodoo," and again on the bottom it says "12 Voodoo."

The Court: We will take a recess at this time.

(Short recess.)

(Testimony of Charles A. Rolley.)

Mr. McKnight: Q. Mr. Rolley, is there any date on Defendant's Exhibit Z?

A. No, there isn't.

Q. Who is Michele—M-i-c-h-e-l-e?

A. Well, my knowledge of a Michele was a young lady who opened up a perfume shop on Chestnut Street, and her own personal name was one that was not good for retail purposes. In fact, I gave her the name for her shop.

Q. Is she still in business?

A. I don't believe so.

Q. Do you know her present address?

A. No, sir. The last time I remember her was she sold the business on Chestnut Street and went into business over in Oakland in a shop there. Since then I believe she is out of that business, and I have no knowledge of what happened to her since.

Q. Was she a personal friend?

A. No, sir. She came to me as a stranger and asked to carry [197] our perfumes.

Q. What was her right name?

A. It is a long Italian name and I don't remember it at this time.

Q. Calling your attention to Defendant's Exhibit A-1, I will ask you whether a great many of these documents show goods returned?

A. From four firms it does.

Q. Were all the shipments of your products to concerns in San Francisco and concerns on the

(Testimony of Charles A. Rolley.)

Pacific Coast, except to Margery Bell in that Exhibit A-1? A. You mean in this?

Q. Yes.

Mr. Hutchinson: Counsel, would not the record speak for itself unless there is some matter of interpretation you would like to find out from the witness?

Mr. McKnight: I think it will shorten the record.

Mr. Hutchinson: I think the record should stand, unless there is some matter of interpretation.

Mr. McKnight: I think he can answer the question very simply.

The Court: What is the question?

Mr. McKnight: Q. Whether all shipments in Defendant's Exhibit A-1 were limited to the Pacific Coast except one order to a Margery Bell in Washington, D. C. [198]

A. That is correct. No, pardon me, Honolulu. There is a good substantial one here for Honolulu.

Q. Was Margery Bell in Washington, D. C., an agent of yours at the time you shipped that order to her?

A. No, sir. By an agent you mean a sales representative?

Q. Yes. A. No, sir, she wasn't.

Q. Calling your attention to Defendant's Exhibit X, are all the shipments in there to parties on the Pacific Coast?

A. No, there are some in here for Honolulu. In fact, there are several for Honolulu.

(Testimony of Charles A. Rolley.)

Q. Shipments were made, then, to the Pacific Coast and to Honolulu, is that correct?

A. In this group, yes.

Mr. Hutchinson: For what year is that?

Mr. McKnight: 1943.

Mr. McKnight: Q. Calling your attention to Defendant's Exhibit Y, are all shipments in this folder to parties in California and the Pacific Coast states?

A. Well, there is Oregon, Honolulu, San Francisco, San Jose, Sacramento. There is a copy of a letter herein pertaining to a mail order to Minneapolis, Minnesota.

Q. But it has nothing to do with Voodoo, does it?

A. It doesn't specify any particular fragrance.

Q. Do you have any record of purchase of labels prior to 1944? [199]

A. I don't recall whether it is 1943 or 1944, but not prior to 1943.

Q. How did you happen to pick the date April 15, 1940, as the date of the first use of Voodoo as alleged in your answer?

A. I thought at the time that that was approximately when I first started using it. That was my impression at the time. I made no effort to go any further back searching my records.

Q. That was purely your oral guess?

A. That is right.

Q. After you made your statement under oath

(Testimony of Charles A. Rolley.)
in your answer, you saw a copy of Plaintiff's Registration Voodoo.

Mr. Hutchinson: If the Court please, this has been asked and answered at least twice. I think we should not repeat it.

The Court: That is right.

Mr. McKnight. Q. On the perfumes that were sold to your friends, do those perfumes have any labels, the early shipments of perfume to your friends around Christmas?

A. I don't know understand the question. What do you mean by my friends?

Q. You said you sold some perfumes to some friends when you first went into the perfume business. Did those bottles have labels on them?

A. The first sales, the very first sales, had no labels at all. By that I mean the very first sales I ever made in my life had no labels on them at all.

Q. How did you happen to choose the trademark Voodoo?

A. Well, my wife and I would get together and try to think up names, and she suggested the name to me. Then she was employed at H. Liebes at the time, and she was floor manager there, and she knew more about the names of perfumes and things like that than I did, not only being in the retail business there, but being a woman.

Q. You used numbers in connection with your reproductions, did you? A. Yes, sir.

Q. What was "54" a reproduction of?

A. "54," as I answered repeatedly, was not a

(Testimony of Charles A. Rolley.)

reproduction. It is an original creation by myself, and it was unlike any other perfume, and not connected in any way with any other perfume.

Q. Have you always used that number in identifying Voodoo in your records?

A. Always, from the beginning; still do.

Q. And you made no search to determine whether or not Voodoo was the property, registered trademark, of any other concern before you used it?

A. I made a search in my own way at the time, yes, sir. I always did on any name we used.

Q. Your search consisted of looking around the stores? [201]

A. On my own part, yes. But, as I say, my wife was connected with H. Liebes & Company and she would go to the perfume buyer there, and they would go through some sort of a catalogue or book or record of title of various perfumes to see if any other company had been using it, and if we couldn't find it, I assumed it was all right to use it.

Q. You didn't go to an attorney and have a search made of the registered trademarks in the patent office, did you?

A. I didn't even know at that time that that was possible.

Q. Would you do that today? A. Oh, yes.

Mr. McKnight: That is all.

Redirect Examination

Mr. Hutchinson: Q. Mr. Rolley, at the time

you started and since has your company imitated any other perfume, or attempted to imitate any other perfume in the Voodoo preparations?

A. I don't understand your question.

Q. Well, I will put it this way: Is Voodoo product, the scent and fragrance as you prepared it and have sold it, as the company does since acquiring your rights in it, an attempted imitation or reproduction of any other representation of any other fragrance whatsoever?

A. No, sir, not in the slightest.

Q. Has it been your personal intention and that of the [202] company at any time to abandon the rights that you or the company had in the name Voodoo in connection with perfume and other preparations? A. No, never.

Q. Have you at any time since you commenced to sell Voodoo products personally, and subsequently on behalf of the company, destroyed your stock or deliberately placed yourself out of stock or products with the Voodoo fragrance and name?

A. We have never been out of stock of Voodoo perfume, no, nor have we ever been out of a label for it, or anything pertaining to it, since I first started using it.

Q. Prior to your entry into the wholesale work, and selling at your shop and store in 1943, as I recall, you kept only usual retail sales slips for records of your business, is that right?

A. That is correct. A sales tag.

(Testimony of Charles A. Rolley.)

Q. Those were destroyed from time to time, is that true?

A. We kept them for, I believe it was around five years, at least five years, and then after that, why, we no longer kept them because I don't know of any business that keeps them too long.

Q. Did you keep a diary or make any other attempt to amass information as to your customers who came in through the earlier years, up to date?

A. No, I didn't. [203]

Q. You didn't have any routine mailing to these retail customers before 1943?

A. No, we never kept a record of that or went into that until after the war. It was, well, physically impossible to do so prior to the war and during the war.

Q. Was your business on a cash basis as regards your customers while you were in the retail business?

A. Until the last three or four years all our retail business has been on a cash basis.

Q. In other words, customers took whatever they purchased and paid for them right at the time?

A. That is right.

Q. You therefore kept no charge account?

A. Not until the last three years or so.

Q. Approximately 1948 or thereabouts?

A. That is right. [204]

* * * * *

WALTER JAMES MORELAND

called as a witness for defendant, sworn.

The Clerk: State your full name and occupation to the Court.

A. Walter James Moreland—M-o-r-e-l-a-n-d. I represent Florasynth Laboratories of New York.

Direct Examination

Mr. Hutchinson: Q. What is the nature of the business of the company for which you work?

A. Well, business of manufacture of essential oils and [205] aromatics chemicals.

Q. What do you mean by "essential oils," very briefly, in lay language?

A. Well, you buy clove spices, you buy cinnamon spices. The oils in that material is the essential oils. The same applies to any natural product which has an oil.

Q. Those are used for flavorings and perfume fragrances and the like, is that correct?

A. That is right.

Q. Are you acquainted with Mr. Rolley, who was on the stand just before you?

A. I have known Rolley for 20 years.

Q. You knew him, then, in 1933 and 1934 and thereabouts? A. That is right.

Q. Do you recall his being in any type of business at that time?

A. Well, when I first met Rolley I was with Carbide & Carbon Chemical Company, who were the main manufacturers of synthetic chemicals. The objective was to find every place that had any occa-

(Testimony of Walter James Moreland.)

sion to use any synthetic chemicals that were being developed. So I just walked into Mr. Rolley's place. He was dyeing some shoes, and I didn't know anything about dyeing shoes, and I soon found out he didn't know much about it either, and I figured if I could get some information that would help him out through our operation I would get a sale, [206] and that is the way I first met him.

Q. You were first acquainted with him as a representative of your then employer, and brought him products to use in his dye shop?

A. That is right.

Q. Subsequently, did you and he discuss the perfume business or cosmetic business?

A. First thing started was a cleansing cream, so-called. It happened Carbide & Carbon Company had come out with a new synthetic named Triethanolamine. Mr. Rolley was trying to make some kind of a cream, and so I showed him how to make us this cream using Triethanolamine and some other items Carbide & Carbon manufactured. It was to our interest, any market we could find that had occasion to use synthetics which Carbide & Carbon manufactured, that is what our business was.

Q. Did you subsequently discuss the use of scent or fragrance for that product?

A. Of course Carbide & Carbon had no interest in odors of any type. However, as far as this cream was concerned, I used to go to Rolley's house in the evening, and we would make this stuff up. As far as his wife and anybody who knew anything

(Testimony of Walter James Moreland.)
about it, they seemed to think it was all right. There was no odor, however; so I knew nothing whatsoever about odors, that wasn't our business, but naturally I was acquainted [207] with people in the field who were acquainted with that line of business, so I suggested to Mr. Rolley he should get in touch with Mr. Hildebrand of L. A. Butcher, who jobbed the van Ameringen Haebler line, and we got from Mr. Hildebrand some samples to put into this cream and try to get an odor that would be satisfactory.

Q. Mr. Rolley's place of business was on Stockton Street at that time, is that true?

A. At that time he was upstairs at Stockton and Geary. Used to be an Owl Drug Store downstairs.

Q. Subsequently were you about when Mr. Rolley had developed his own perfume?

A. Well, it was, I think, around Christmas time of the first year that I met Rolley, and just about the time of the banks all being closed. I remember at that time it was kind of hard getting money. Rolley was interested in making some perfume and giving some perfume to accounts of his from whom he used to get shoe dyeing business, that is, like Frank Warner and Sommer & Kaufmann and different stores who turned over shoe dyeing to him.

After we got him straightened out on the dyes there, he was doing a good business, and he wanted to give some of these accounts some bottles of perfume for Christmas. So, as I say, I knew nothing

(Testimony of Walter James Moreland.)
about the perfume end of it, but Hildebrand—in fact, he didn't know anything about it, [208] either, but we were able to get through Mr. Hildebrand, just as I got through Carbide & Carbon, deals on the perfumes, materials for making perfumes.

I remember this Owl Drug Store, Rolley was acquainted with somebody down there and he went down and got a bunch of bottles from them and made up the perfume, put it in the bottles, and that was the start of it.

Q. Do you remember the year 1933? When do you think that was?

A. Whatever year the banks were closed. I think it was 1933.

Mr. Hutchinson: I think we can take judicial notice of that, your Honor.

The Court: I think everyone thinks that.

Mr. Hutchinson: In the following year did you have any acquaintance with Mr. Rolley and his activities in the perfume business?

A. Oh, I have followed Rolley along off and on ever since; the past few years he has been in his own field and I have been in my field, so we haven't come in contact much. But at first there I was very much interested in pushing the business of Rolley as much as I could because, as I say, it was our business to sell synthetic chemicals, and the perfume end of it, we didn't enter into the picture on that end, but anything that would boost his entire business was to our advantage. [209]

Q. Do you recall those early days, 1933, 1934,

(Testimony of Walter James Moreland.)
1935, whether or not Mr. Rolley used any names in combination with particular perfumes he prepared?

A. That, of course, is a retail end of the business and there gets away from the production side. However, I know Rolley would ask me once in a while, "How do you think this name would be?" and I had no judgment on the thing, but some of the names he used were so ridiculous, so far as I was concerned, I couldn't understand anybody paying any attention to them. So that's the only knowledge I have of names is what he was talking about, so far as that is concerned.

Q. These names he suggested to you that sounded extreme or ridiculous, do you now recall any of those?

Mr. McKnight: Your Honor, I am going to object unless this is tied down to a time and place.

The Court: He may answer yes or no and then fix the date.

A. As I say, I first—when was it the banks closed, Judge, do you remember?

Mr. Hutchinson: I think we stipulated it was March, 1933.

The Court: 1933.

A. Well, it was the Christmas of 1933 that Rolley first started making up these perfumes. Then the following year, as long as he was there at Geary Street he didn't do any particular amount of business so far as the sale of perfume [210] was concerned.

(Testimony of Walter James Moreland.)

When he went from Geary and Stockton up to a location on Geary Street next to Nathan Dohrmann's, that is when he put in the room that—the room for perfumes.

Q. Do you recall the date of that in relation to 1933?

A. That must have been around 1935 or 1936, somewhere in that time.

Q. With reference to that period, say, 1935, 1936, earlier than that do you recall any particular name?

A. Yes. Like I say, when he first started making them, when he was making them up as gifts for accounts that he was getting business from, the idea was he couldn't very well give somebody a bottle of perfume with no name. So he had all these names he had worked up, and I remember one he used to call Red Red Rose. I never could understand the reason for the two "Reds," but that seemed to be O.K.

And it was about that time, I think, there was quite a lot of talk about some Voodooism down in Porto Rico, somewhere around in there, and so I remember he had the name "Voodoo," and I couldn't understand what the dickens relation the name "Voodoo" had to perfume but it wasn't any of my business. Rolley would ask me about these names and I would always tell him he was in the retail business, he knew more about those things than I did.

Q. Do you recall that was earlier than 1936?

(Testimony of Walter James Moreland.)

Mr. McKnight: That is objected to——

A. Oh, yes.

Mr. McKnight: ——as leading, your Honor. I think he should ask this man when these things took place?

A. This started—the first perfumes were made up at Christmas, 1933. Then about two years after that time, that must be about 1935 when he moved up on Geary Street and had more space for selling perfumes. Exactly what date that was, I don't know; but it wasn't very long after it started.

Mr. Hutchinson: Q. In other words, if I understand you, you fix the time when you remember the use of that name Voodoo at something like two years after you first talked to him about perfume?

A. As far as using the name is concerned, I don't know when he started using it. I know he was talking about it before he ever went up on the place where he had this set-up on Geary Street.

Q. In other words, he asked your reaction to the idea? A. That is the idea.

Q. At that time did you ever pay any particular attention to the use of the name in combination with perfumes or other products? Did you notice that?

A. Well, as I say, my contact with the retail business was practically zero, only in talking with him he would tell me this, that, and the other thing. But I had no connection [212] with the retail business whatsoever.

Q. Did you observe this display room?

(Testimony of Walter James Moreland.)

A. Yes, he put in a fancy room there.

Q. Did you notice any products with the name Voodoo on them?

A. Oh, he had a list there as long as your arm, every name he could think of, as far as that is concerned.

Q. That was in the shop where he was doing business? A. That is right.

Mr. Hutchinson: You may cross examine.

Cross Examination

Mr. McKnight: Q. Mr. Moreland, what other trademarks did you see there, displayed there at the time?

A. I wouldn't say trademarks. They were just names.

Q. What other names did you see besides Voodoo?

A. Oh, he had Forever, Red Red Rose—God, it's so long ago, by golly.

Q. Did you see a lot of bottles with numbers on them?

A. No, I don't remember any numbers.

Q. When did you talk with Mr. Rolley about coming here to testify?

A. Well, as a matter of fact he called me, oh, I guess it was sometime six or seven months ago, wanting to know if I would—if it really came to a court trial, if I would testify what I knew about the business, and I told him no reason I knew why

(Testimony of Walter James Moreland.)
not, just nothing but straight facts, why shouldn't I tell [213] anybody.

Q. You came here without a subpoena, did you not? A. That is right.

Q. You came voluntarily? A. Yes.

Q. And you were a personal friend of Mr. Rolley's?

A. Well, somebody you had done business with twenty years ago over a period of years, I don't know whether you would call them a personal friend or not, but I am pretty well acquainted with Mr. Rolley, yes.

Q. Have you done business with Mr. Rolley?

A. I have, as I say, I have never done any business since he got out of the shoe dyeing business because I had nothing to sell him.

Q. When did he go out of the shoe dyeing business? When did you stop selling him any materials?

A. Oh, his main business in that field, as I remember it, dropped off about a couple of years after he moved up to this place where he put in this perfume room. That must have been around about 1936 or 1937.

Q. And you quit selling him in 1936 or 1937?

A. As a matter of fact, I think the shoe dyeing business was just dying out, because that was the time they came out with a lot of new fabrics for shoes.

Q. Did you sell Mr. Rolley supplies for the shoe dye business? [214] A. That is correct.

Q. From what year to what year?

(Testimony of Walter James Moreland.)

A. Well, as I say, the spring of 1933 up until about 1936 or 1937.

Q. Who did he buy his shoe dye supplies from from 1936 to 1937?

A. So far as dyeing shoes is concerned, you see, the business changed entirely. Then it developed into a suede business, which was a question of dyeing suede shoes, which was entirely different from dyeing fabricated shoes.

Q. Didn't you sell those dyes to him?

A. No.

Q. Didn't you see Mr. Rolley up until about 1943? A. Oh, yes, sure.

Q. He was still in the shoe dye business at the time?

A. But the amount of shoe dye was very limited. The business switched to the suede business then.

Q. Can you tell us the date when you first saw a bottle of perfume bearing the name Voodoo in Mr. Rolley's premises?

A. God, no, I couldn't tell you.

Q. You couldn't tell us definitely? A. No.

Q. You have no documents which would as of this time——

A. As I say, my contact with Rolley was purely the production side, and the retail side of the business I didn't have any [215] knowledge of.

Q. Don't you want to go on oath before this Court as stating any date you saw a bottle of per-

(Testimony of Walter James Moreland.)

fume on Rolley's premises bearing the trademark Voodoo?

A. Voodoo or anything else, so far as I am concerned, as I say, I never got in contact with the retail end of the business.

Q. You don't know anything about the first bottle of perfume in Mr. Rolley's place you would be willing to swear to? A. That is correct.

Mr. McKnight: I move to quash the testimony of this witness on account of this gentleman knows nothing about the name Voodoo or use of the trademark.

Mr. Hutchinson: I would like to argue any such motion. This witness could only by some quite remarkable circumstance remember a specific date when he saw a specific bottle of Voodoo.

The Court: I will allow the record to stand. Let it speak for itself.

Mr. McKnight: Q. You never bought any Voodoo perfume from Mr. Rolley, did you?

A. No. As I say, I had no interest in the retail end of the business at all.

Q. All you can say is that you talked to Mr. Rolley about the word Voodoo as a trademark?

A. That is correct. As a trademark? Wait a minute—— [216]

Q. As a name? A. Just a name.

Q. But you don't know when he started to use the name on perfume?

A. I know he was using it. He was telling me about having used it.

(Testimony of Walter James Moreland.)

Q. Except what he told you, you don't know?

A. That is correct.

Q. All you know is what he told you?

A. That is correct.

Q. You didn't see any bottle you say you have any independent recollection of bearing the name Voodoo?

A. No, I have not. I didn't pay any attention to it.

Mr. McKnight: That is all.

Mr. Hutchinson: That is all.

(Witness excused.)

GERTRUDE LABHARD

called as a witness for the defendant, sworn.

The Clerk: State your full name and occupation to the Court.

A. My name is Mrs. Theodore Labhard. At the time I first knew Mr. Rolley I was Gertrude Menth.

The Court: Raise you voice a little.

A. Yes, sir. [217]

Direct Examination

Mr. Hutchinson: Q. Mrs. Labhard, you have known Mr. Rolley a number of years, have you not?

A. I came up from Los Angeles in December, 1938, and through a friend I was introduced—through some mutual friend I was introduced to him, and we were co-tenants, and I believe as near

(Testimony of Gertrude Labhard.)
as I can recall—I haven't got my records any more for it, but as near as I can recall it was February, 1939. I might be a little off in date, but as nearly as I can remember it was shortly after I came that this friend introduced me.

Q. What was the nature of your business at that time?

A. I made suede garments: dresses, hats, coats, gloves. And then Mr. Rolley was cleaning and dyeing suede garments and shoes, and our business more or less coincided.

Q. As a matter of fact, when you and your employees were absent, or his were absent, you would attempt to take care of one another's calls?

A. That was the agreement. We were both rather single-handed at the time, and when calls would come, he would answer my phone calls and I would answer his phone, and occasionally when he was out I would wait on his customers, also.

Q. At that time what was the address where you both occupied space, do you recall?

A. It was at 212 Stockton. We were there a very short time, and it was too crowded, and we moved to 239 Geary.

Q. Do you recall when you moved to 239 Geary, as to the year? [218]

A. It was a very short time after I was with him and was in the first part of 1939. The exact month I do not know. It might be two months. As near as I could recall, it would be about two months

(Testimony of Gertrude Labhard.)

after we were first together. I think that was the first of February.

Q. Calling your attention to the perfumes that might or might not have been present in the place, do you have any recollection of that subject?

A. When I first went with him he was making perfumes on a small scale and sold to some of his customers and to some of mine, and occasionally I would sell for him if he was busy or out.

Q. Was there a display or any arrangement for displaying perfume?

A. On Stockton Street there was just one case in the reception hall, and it had some things I had made in suede and some of his dyes and creams, and it also had a small display of perfume. Later when he and I moved to Geary there was an alcove in the room in the reception room devoted to just his perfumes.

Q. Before you moved, did you notice whether any of these containers of perfume had any names on them?

A. No, sir, so far as I can recall there were no names. The perfumes were sold by numbers only then. I don't recall any names. There are a few names that I can recall from when I later sold some on Geary. [219]

Q. That is some two months later?

A. About two months later. I don't remember the exact date.

Q. Do you remember whether there were names on the botttles were sold by name on Geary?

(Testimony of Gertrude Labhard.)

A. On Geary, as I recall, to the best of my recollection some of them were named and a great number were numbered. The first I recall I made a sample display for him, full of little tiny vials of different fragrances, and it was made of wood and I covered it and I lined it for him. Those bottles were numbered and the numbering card corresponded with the numbers with names to some of them.

Q. Do you recall any of those by name that had a name associated with them as far back as 1939?

A. Well, could I put that this way, I recall the names prior to about February of 1940. I don't know just—I can't exactly tell you when he first used them between the time that I first knew him and the first part of 1940, but I do know some of the names and I knew that he used them.

Q. Will you give us some of the names?

A. I could give you the names of those I particularly liked. I liked his Garden Paints and Red Rose, and there was a Wood Violet and a Lilac.

Q. Calling your attention to the name Voodoo, did you see or hear or observe the name, notice the use of Voodoo during that same period you knew Mr. Rolley's perfume? [220]

A. Yes, I remember it. He told me he had that name, and I could see no connection with it in regard to perfume. That is the reason I remember the name.

Q. You personally didn't use it yourself?

A. Most of the customers I waited on I sold

(Testimony of Gertrude Labhard.)

them as a steady customer—numbers on a sheet here, and tell by number. They would come in and buy perfume by number. After that there were labels, but I don't know when that was.

Q. You think it was during this period, 1939-1940 he started using labels?

A. He used a label prior to 1941. Just what time in between that period he started using labels on them I don't recall. I do know it was before 1941, because I got married in 1941 and no longer had a business in March.

Q. To your recollection that first antedated 1941?

A. Yes. I was married in March, 1941.

Q. Did you see any labels at any time during that period hearing the name Voodoo in Mr. Rolley's perfume premises or display case?

A. He had the name then. I don't recall a label, but I recall the name was on the card. It was a strange name and I remembered it. [221]

* * * * *

Cross Examination

Mr. McKnight: Q. Were you in the business connected with shoes, suede garments, and things of that nature in 1938 when you first met Mr. Rolley?

A. I met Mr. Rolley—I didn't come to San Francisco until the end of 1938. I met him the first of 1939, and it was—the reason I said I think it was February when I first met him, I have some records I have kept in regard to teach-

(Testimony of Gertrude Labhard.)
ing pattern drafting, and I have a letter written by him. That was in 1941 [222] and it was in February, and it said that he had known me for two years. He stated we had been co-tenants for two years. That is the reason I think it was February. It might have been March.

Q. Approximately February, 1939?

A. Yes.

Q. Mr. Rolley's business was primarily in the shoe dyeing business?

A. And cleaning of suede garments.

Q. Was that his primary business at that time rather than perfumes?

A. He had all three. He dyed shoes, cleaned suede garments, and we had a perfume display in the counter.

Q. When did you move to Geary Street? Approximately April, 1939, is that right?

A. Approximately there. I don't remember the month. We were there on Stockton a very short time.

Q. On both Stockton Street and Geary Mr. Rolley had perfumes that bore numbers, is that correct? A. Yes, sir.

Q. Did you help him sell some of the perfumes that had numbers? A. Yes, sir.

Q. What did these people ask for when they came in for perfume?

A. A number of them would bring their bottle back.

Q. Did some of them ever use the names that

(Testimony of Gertrude Labhard.)

appeared on the [223] card that showed what the numbers meant? A. Occasionally.

Q. For instance, you had a card that explained what these numbers meant?

A. Yes, sir.

Q. Were these numbers copies of famous perfumes?

A. There were a couple of names that I had heard before, but the great many of them I had never heard. Most of them I had not. A lot of them were not named at all.

Q. I show you a list that bears names and ask you what name or names were familiar to you during the time you sold perfume for Mr. Rolley?

A. I think Wicked. I don't know about Torrid.

Q. Had you Forbidden Flame on the list?

A. I don't remember that name. Serenade, I think, and Rendezvous and Forever, and the Florals, I remember most of those because those I was partial to.

Q. You say you never saw the trademark Voodoo on a label in Mr. Rolley's, is that correct?

A. No, sir. He started with the labels——

Q. You didn't see it yourself, you saw it on a card, I thought you said.

A. Just before I discontinued by business he had started with the labels then.

Q. But did you ever see a Voodoo label while you were— [224] I maybe misunderstood your direct testimony, but I thought you said that you

(Testimony of Gertrude Labhard.)

did not see a Voodoo label while you were there and before you were married.

A. I don't recall the name on any label. I do recall he started using labels before I discontinued.

Q. But you cannot say under oath you saw a Voodoo label, can you?

A. No, sir, but I remember, I am quite sure I remember the name as being sold then because I recall it is such a strange name.

Q. But you didn't see it on a bottle that you can definitely say?

A. It was on a card that he had.

Q. You say it on a card but didn't see it on a bottle, is that correct?

A. Yes, I guess that is right. [225]

* * * * *

ALMA HOMILIUS

called as a witness for the defendant, sworn.

The Clerk: State your full name and occupation to the Court.

A. Alma Homilius—H-o-m-i-l-i-u-s.

Direct Examination

Mr. Hutchinson: Q. What is your business and occupation, Mrs. Homilius?

A. I am in the making of garments.

Q. Are you acquainted with Mr. Rolley?

A. Yes, I am.

Q. Do you recall when you first became acquainted with him?

(Testimony of Alma Homilius.)

A. Oh, it would be back in 1932.

Q. What was your first acquaintance with him, in what connection?

A. Well, he happened to be in the same building I was in business.

Q. Do you recall the address?

A. 212—Stockton. [226]

Q. At that time did you have any occasion at any time to visit his place of business?

A. Yes, I did.

Q. Do you recall at what time, if at all, you noticed his doing anything with perfumery?

A. Well, yes, because I think I got most of his samples.

Q. In other words, he tried it out on you, so to speak, is that right? A. That is right.

Q. And that occurred at 212—Stockton Street?

A. That is right.

Q. Do you recall any of the names of the earlier products he used?

A. Yes, I think I do. One is Voodoo.

Q. Do you recall any of the others at this time?

A. There was one, Red Red Rose.

Q. When do you recall first having seen or heard the use of Voodoo in connection with any of his perfumery products?

A. Well, it was shortly after that, after 1933 or something like that.

Q. In other words, rather shortly after you had become acquainted with him?

(Testimony of Alma Homilius.)

A. That is right.

Q. Do you recall he remained in that building for some few years? [227]

A. Oh, yes. He was across the hall from me.

Q. That is, he had more than one location in the same building? A. That is right.

Q. Did you see any of his perfumery products around his place of business?

A. Well, yes.

Q. He had a display case of some sort?

A. Yes, small display case at 212—Stockton.

Q. If I remember correctly, you stated that from time to time he brought in some new preparations? A. To get my okeh.

Q. Did he discuss with you the appeal, if any, of the names he had thought of to use?

A. At first he used numbers, then later on the names came in.

Q. To the best of your recollection, then, you think Voodoo was used about 1933 to 1934?

A. That's right.

Mr. Hutchinson: You may cross examine.

Cross Examination

Mr. McKnight: Q. Is your name Mrs. Homilius?

A. Miss Homilius.

Q. Were you a neighbor of Mr. Rolley's at 212 Stockton Street? A. Yes.

Q. Did you live next door to him? [228]

A. Just across the hall.

(Testimony of Alma Homilius.)

Q. Did you know Mrs. Rolley?

A. I did.

Q. Are you related to Mr. Rolley in any way?

A. No, I am not.

Q. Or to Mrs. Rolley? A. No.

Q. How did you hear about coming here to testify?

A. Oh, I think Mr. Rolley talked to me.

Q. Who did? A. Mr. Rolley.

Q. How long ago?

A. Oh, I think last week or two weeks, something to that effect.

Q. He used to give you samples of his perfumes? A. That is right.

Q. Did he give you samples of any of the numbered perfumes?

A. Well, that I don't—at first, see, he just used numbers, trying to get some names.

Q. Do you recall he referred to any of the numbers by name?

A. That I wouldn't remember.

Q. Did he ever refer to any other trademarks than Red Red Rose and Voodoo?

A. Well, that Garden Pink, Forever.

Q. You never bought any perfumes of Mr. Rolley, did you? [229]

A. No. I usually got mine.

Q. You always got them for nothing?

A. That is right. But I have handled them and I have been in the shop for other business.

Q. When did you start handling them?

(Testimony of Alma Homilius.)

A. I mean just reach over and look at them when I was in the shop.

Q. Oh, I see. But you never bought any yourself or paid for any? A. No, I didn't.

Q. Well, now, did Mr. Rolley have a list of perfumes in his shop at 212 Stockton?

A. That I didn't pay any attention to.

Q. Did you see the name Voodoo an any of the bottles he gave you?

A. Yes, when he was on 239 Geary, when he had them.

Q. He had a name on the bottles at 239 Geary, but he didn't have any on the bottles when he was on Stockton Street?

A. Well, that is going back quite a ways.

Q. This is important, Miss Homilius. You don't recall seeing Voodoo on the bottles at Stockton Street, do you? A. No, I don't.

Q. About what year did you see the name Voodoo on the bottle at Geary Street? How many years later would that be?

A. That I could check back just what year he was on Geary Street. [230] I think he left our building 1939, 1938. I don't know. That is the best of my knowledge.

Q. Did you get any samples of the perfume from Mr. Rolley after he was on Geary Street?

A. No, I guess not.

Q. So the only samples of perfume you received from Mr. Rolley were while you were on Stockton Street, is that correct?

(Testimony of Alma Homilius.)

A. Well, now, he has given me sample when I have met him in the street.

Q. Do you recall any samples you ever received in which Voodoo appeared on the bottle?

A. Well, it must have been there.

Q. Well, you don't know of any that you say under oath that you received?

A. Well, get perfumes, you don't always look at the label when someone gives it to me.

Q. You can't testify here this morning on the stand as to any date when you ever received a bottle from Mr. Rolley that had the name Voodoo on it, can you?

A. No, just that I knew it was Voodoo.

* * * * *

Redirect Examination

Mr. Hutchinson: Q. In your discussions with Mr. Rolley of [231] names of perfumes, did you ever discuss with him the name Voodoo, make any comment on it?

A. Yes, I did, because I wanted to know the origination of the name. In fact, I called the word "Hoodoo."

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MRS. EDWIN A. WIGGLEY

called as a witness for the defendant, sworn.

The Clerk: State your full name and occupation to the Court.

A. Mrs. Edwin A. Wiggley. [232]

* * * * *

(Testimony of Mrs. Edwin A. Wiggley.)

Direct Examination

Mr. Hutchinson: Q. Mrs. Wiggley, are you acquainted with Mr. Rolley? A. Yes.

Q. Do you recall when you first became acquainted with him?

A. Well, it was during the War, approximately 1943.

Q. And in what connection did you come to know him? A. As a customer.

Q. And what type of service or product did you purchase from him? A. Perfumes.

Q. Do you recall what place he had, that is, the address of his place at that time?

A. Not the number. It was on Geary Street, down at the same place where he is now.

Q. And that was on a street level location?

A. Yes.

Q. Did you at that time examine the contents of the shop or observe them as to the type of perfume or names on display there?

A. He had a very nice shop with all kinds of perfume displayed.

Q. Calling your attention to the name Voodoo, did you see that displayed at that time in conjunction with any of his perfume products? [233]

A. Yes.

Q. Did you personally purchase that commodity? A. Yes, I did.

Q. And was it perfume only, or were there other products by the same name?

A. Just perfume and cologne.

(Testimony of Mrs. Edwin A. Wiggley.)

Q. Did you purchase both of those?

A. Yes, I did.

Q. Do you recall approximately when you made the first purchase?

A. Well, I am sure that I was there when he first opened that shop. I don't know the date that was exactly. It was during the War.

Q. You think it was 1943 or thereabouts, is that right?

A. Yes. It may have been earlier.

Q. Now, did you have any friends who also shopped at Mr. Rolley's place?

A. Most of my friends had me do the shopping. I would make purchases for other friends, and I may have sent him some customers, but I don't know.

Q. In shopping for other friends, rather, your friends that you would shop for, did you purchase Voodoo products for them?

A. Yes. [234]

* * * * *

Cross Examination

Mr. McKnight: Q. Mrs. Wiggley, you are now a housewife? [235] A. Yes.

Q. Do you sell any perfume now for Mr. Rolley?

A. No, I never have.

Q. You purchased for your friends?

A. Well, I mean just like my neighbor, I say, "Will you buy me a loaf of bread?" When I go to the store I picked up various articles for people.

Q. As a personal favor for them?

(Testimony of Mrs. Edwin A. Wiggley.)

A. That's right.

Q. I see. Now, you have no sales receipt for any of the Voodoo perfume that you brought from Mr. Rolley? A. No, I do not.

Q. Did he ever give you any at the time you made the purchase? A. Oh, yes.

Q. Each time you made a purchase?

A. But I threw them away.

Q. You didn't keep them?

A. That is right.

Q. So you only fix this date by the War?

A. Yes, I do.

Q. Could it be in 1944?

A. No, it would be earlier than that. I can fix it by my job, and also we made a move at that time.

Q. Were you working in 1943 for the Orpheum Theater? A. Yes. [236]

Q. Did you work in 1944? A. Yes.

Q. Well, then, you might have—you can't fix it just by your work.

A. No, I can fix it by our move. We moved in 1942 on Sacramento Street, and it was right at that time that I made all of the purchases of perfume.

Q. Did you have again afterwards?

A. No, I stayed there until after the War.

Q. It was after that you bought it?

A. Yes.

Q. After 1942?

A. It would be the latter part of 1942 or 1943.

(Testimony of Mrs. Edwin A. Wiggley.)

Q. And you have no other way of fixing it except from your memory? A. That is right.

Q. Can you tell us anything else that you bought in 1942 or beginning of 1943, any other products? A. I bought furniture.

Q. Do you recall buying any perfume from any other source?

A. Yes. I buy lots of perfume.

Q. Did you ever buy any Tabu products?

A. No, I can't wear it.

Q. Did you ever buy any perfumes of famous brands? A. Yes. [237]

Q. Chanel No. 5? A. Yes.

Q. Did you ever buy any of Mr. Rolley's reproductions by number?

A. No, I never did.

Q. Did you ever know that he sold them?

A. No, I didn't.

Q. Now, will you give us the name of any other perfumes that you bought in 1943, and tell us where you bought them?

A. I believe I bought Mais Oui.

Q. Where did you buy that?

A. At Weinsteins.

Q. Who puts out Mais Oui?

A. I don't know. They make Evening in Paris, I believe.

The Court: Weinsteins is right down the street here?

A. That is right.

Q. They handle everything?

(Testimony of Mrs. Edwin A. Wiggley.)

A. They do.

Mr. McKnight: Q. How did you happen to come here to testify? Did Mr. Rolley ask you to?

A. Not exactly. I was in his shop almost a year ago now, buying quite a bit of perfumes for the holidays, and it was mentioned something about this and I volunteered to come at that particular time.

Q. As a personal friend? [238]

A. No, as a customer. I mean, I remember Voodoo and I thought that was only the right thing to do.

Q. Have you ever testified before in court?

A. No, never have.

Q. But you came here this morning without a subpoena? A. That is correct.

* * * * *

NATALIE ANIS

called as a witness for the defendant, sworn.

The Clerk: State your full name and occupation to the Court.

A. Natalie Anis.

Direct Examination

Mr. Hutchinson: Q. Mrs. Anis, do you have any employment or business?

A. I work for Rolleys, Incorporated.

Q. And you have been working with Rolleys, Incorporated, for how long?

A. Roughly ten, eleven years.

(Testimony of Natalie Anis.)

Q. You worked for Mr. Rolley, then, did you, before the incorporation, is that right?

A. Yes. [239]

Q. When did you first start to work for him?

A. February or March, 1940.

Q. At that time what was the nature of your work with Mr. Rolley?

A. Well, I did a little bit of everything.

Q. Did you do any selling of the products in the perfume line? A. Sometimes, yes.

Q. Did you look after some of the books and correspondence? A. Some correspondence.

Q. Now, did you become familiar at that time, that is, when you first went to work, with supplies and what not, perfume, and the labels and the other things? A. Yes.

Q. At that time did you observe any product that was designated as Voodoo or by the name Voodoo? A. Yes.

Q. Could you tell us briefly what those products were?

A. Perfumes in bottles of different sizes.

Q. Yes. Did you see any labels bearing that name? A. Yes.

Q. Did you see any bottles with labels during——

Mr. McKnight: (interposing) Your Honor, all this has been very leading, and I think counsel should ask the witness what she saw instead of putting the words into her mouth. [240]

(Testimony of Natalie Anis.)

Mr. Hutchinson: I think there is nothing leading about this.

The Court: Yes, there is. The questions are leading and suggestive.

Mr. Hutchinson: Q. Will you state what, if anything, you observed, Mrs. Anis, with regard to bottles of any nature bearing any label making reference to Voodoo?

A. We had some Voodoo strips, the old style which came in strips about one half by four, about twelve or fifteen names, horizontal, instead of the individual pieces we have now.

Q. How were those used by you in working for Mr. Rolley?

A. We cut them into individual strips.

Q. And were there any names on these strips so that when you cut them they would remain as a separate name on the part that had been cut off? A. I am sorry?

Q. I am not sure I understand what you mean by strips. Long strips with various names?

A. No. For Voodoo? May I use my hands?

The Court: Yes.

A. They were that high (indicating)——

The Court: One half inch high?

A. The Voodoo was imprinted horizontally.

Q. It would be printed off and on on the strip?

A. Yes. [241]

Q. When you say you cut it, you mean you cut between the printing so that you had a "Voodoo" left on each piece?

(Testimony of Natalie Anis.)

A. That is correct.

Q. Is it also not true those wrappers were prepared so that they would adhere to things if applied? A. Yes.

Q. Did you do any work in preparing perfumes? I mean by that, packaging them or anything of that nature?

A. I did package them, yes.

Q. Did you have anything to do with the placing of these wrappers, as you have described them, on any container?

A. On the bottles after they were bottled, yes.

Q. Did you have any occasion to place those on exhibition in the shop or anywhere?

A. Into the stock boxes.

Q. Were they kept on the premises?

A. Yes, under the counter.

Q. At that time I believe the business was a retail business, is that true? A. Yes.

Q. Subsequently was there any change in the nature of the business?

The Court: Do you understand that question?

A. I am sorry, sir, I don't.

The Court: Tell him you don't. [242]

A. I am sorry, I don't understand.

Mr. Hutchinson: Q. I see. Perhaps counsel will not object to my directing your attention to the fact that there may have been a change from a purely retail business to a retail and wholesale business. Directing your attention to that subject,

(Testimony of Natalie Anis.)

did Mr. Rolley, or the company ever go into the wholesale sales?

A. Not at that location, no.

Q. This particular location was in what place?

A. 239 Geary.

Q. Was that a street level shop or above the street level? A. Above the street level.

Q. And there was a subsequent move from 239 Geary to Stockton—to some other place, is that true? A. Yes.

Q. What was the next address that you remember? A. 108 Geary.

Q. Was that also above the street level in the building, or was that a street level office?

A. Street level.

Q. At that time did you do somewhat the same sort of work for Mr. Rolley in his business?

A. Yes.

Q. And at that time was there any wholesale business conducted by Mr. Rolley?

A. Yes. [243]

Mr. McKnight: This is objected to unless you tell when.

The Court: Fix the time.

Mr. Hutchinson: Q. Do you recall the approximate time when you moved to 108 Geary?

A. Let's see, '42 or '43.

Q. Do you have any way of fixing that in your mind, any other event or anything of that sort to fix the date?

(Testimony of Natalie Anis.)

A. I can't say I am sure about it, the year, but it was before Christmas.

The Court: In what year?

A. It must have been '42. 1942.

The Court: 1942?

Mr. Hutchinson: Q. In 1942? That was the year after the outbreak of the War. Does that also fit in with your recollection? A. No.

Q. All right, then, at 108 Geary there was some wholesale business done, that is, selling to the public, is that true? A. Yes.

Q. At that time do you recall the use of Voodoo as a name for perfumes in connection with Mr. Rolley's business? A. Yes.

Q. Since that time the business has continued at several addresses, is that true?

A. Yes. [244]

Q. Can you tell us the other addresses where business was carried on by Mr. Rolley or by the company in chronological order?

A. 361 Sutter Street.

Q. When was that place operated?

The Court: What year?

A. Latter '42.

Mr. Hutchinson: You say 1942? Did Mr. Rolley have two places at that time?

A. I am sorry. We had 108 and 120. They were next door. And the Sutter Street served as a wholesale outlet with a retail front.

Q. In other words, there were more than one place at that time, is that right, Sutter and Geary?

(Testimony of Natalie Anis.)

A. Sutter and Geary.

Q. During those times, did Mr. Rolley or not have a supply of Voodoo products?

A. He did.

Q. Did he also offer them for sale during that time? A. Yes.

Q. You did some of the sales work yourself, did you not, waiting on customers? A. Yes.

Q. Did you personally at any of these times sell any Voodoo products? [245] A. Yes.

Mr. McKnight: Objected to unless he fixes the time again, your Honor. It is very vague.

Mr. McKnight: We endeavored to do so.

The Court: When did you sell these Voodoo products?

A. There was a young lady working for us, Mrs. June——

The Court: Just a minute. You will have to try to fix the time as near as you can.

A. Oh, Christmas, '42.

The Court: 1942?

Mr. Hutchinson: Then Christmas time, 1942, is the time—you did sell Voodoo products for Mr. Rolley then, is that right? A. Yes.

Q. Did you do that continuously or only during the Christmas season? A. Continuously.

Q. From that time on did you continue to sell Voodoo products for Mr. Rolley or subsequently the Rolley Company?

A. Excuse me, sir, I wasn't strictly a sales person, so I could say that I sold it continuously.

(Testimony of Natalie Anis.)

Q. I understand. You did so from time to time?

A. Yes.

Q. In other words, you were helping in the office, helping with the stock, and also with sales when there was more business [246] than the clerk could handle, is that right? A. Yes. [247]

* * * * *

Q. In connection with your work you also had occasion, did you not, to receive orders that were sent to the company, or to Mr. Rolley, before, for his filling or the company's filling? [248]

A. Yes.

Q. I will show you Exhibit X for the defendant, and I will ask you to examine the contents of this folder bearing letterhead of Rolley and dates November 16, 1943, and other 1943 dates, and ask you if you can identify any of those documents?

A. Yes.

Q. On those documents there are, as I recall no names, that is true, is it not? A. Yes.

Q. These are what? That is, what is the purpose of these documents in the business?

A. We have our—let's see, how can I say that? —we have the corresponding numbers for the different names.

Q. And those are what you call stock numbers?

A. Stock numbers. Instead of writing the full name we write the stock number.

Q. The number 54 I see here. What does that mean? A. Voodoo.

Q. Had that been true throughout the time you

(Testimony of Natalie Anis.)

have been with Mr. Rolley and the company?

A. Yes.

Q. Did you prepare any of these particular bills? Will you examine them and see if you did.

A. Some of them I did, yes.

Q. Those documents I have just shown you, Defendant's Exhibit X, [249] are in general invoices, are they not? A. Yes.

Q. I show you now Defendant's Exhibit Y relating to the year 1944, bearing dates, and I will ask you if you will briefly examine that file and state whether you can identify it and what its contents are in a general way?

A. These are the original orders from our accounts, and our invoices.

Q. Had you seen any of those at the time or about the time that they were either received or made up in the office where you worked?

A. Yes.

Q. Did you yourself have anything to do with filling the orders? A. Yes, I did.

Q. And did you yourself have anything to do with preparing the invoices?

A. Some of them, yes.

Q. And you recognize some of them as yours, do you not?

A. Yes, I do. My initials are here. [250]

* * * * *

Cross Examination

Mr. McKnight: Q. Mrs. Anis, your work for Mr. Rolley in 1940, February of that year, what kind of work did you do for him?

(Testimony of Natalie Anis.)

A. We had the dye shop, also, and I worked in the dye shop.

Q. What kind of work did you do in the dye shop? A. Dyeing.

Q. Then in 1943 you did more work in the perfumes? A. Yes. [252]

Q. What duties did you have in connection with the perfumes, Mrs. Anis, did you type the invoices yourself? A. Yes.

Q. Are you able to recognize the invoices you typed by just looking at the typing?

A. Yes.

Q. Can you tell your typing from other typing?

A. From Mr. Rolley's, yes.

Q. And he is the only other one that did typing? A. Let's see. No——

Q. (interposing) I call your attention to——

The Court: I don't think the witness has finished her answer.

Mr. McKnight: Q. Oh, continue, please.

A. We had a Miss Irene—oh——

The Court: Is this another typist?

A. She did some typing.

Mr. McKnight: Q. Calling your attention to Defendant's Exhibit X, and to the second page thereof, can you tell me who typed that?

A. That is mine.

Q. How can you tell that you typed it?

A. For one thing, the typing is evener. I have a certain way of setting type.

The Court: Read the answer. [253]

(Testimony of Natalie Anis.)

(Answer read by the reporter.)

Mr. McKnight: Q. Is this different from anyone else's? A. Yes.

Q. Do you use a typewriter different from anybody else's?

A. I recognize my own typing, that is all.

Q. Can you tell us any particular characteristic in that shape that makes you recognize it as your own, distinguished from any other typist's?

A. I believe that I was the only one typing that year.

Q. But otherwise you can't distinguish the typing from any other typist's who might have written this, can you?

The Court: Do you understand that question?

A. I am sorry, sir, it isn't clear to me.

The Court: Well, tell him, then.

A. May I have that question again, please, sir?

Mr. McKnight: Q. You recognize this, you say, because no one else was typing there at that time, is that correct?

A. Sometimes Mr. Rolley did.

Q. Is there any way you can say your typing differs and recognize it as your typing?

A. As I said before, Mr. Rolley and I did the typing, and I will recognize my own from Mr. Rolley's.

The Court: In what way would you be able to do that?

A. He struck over his keys.

(Testimony of Natalie Anis.)

The Court: What is that? [254]

A. He struck over his keys.

The Court: How do you know that?

A. Because I have seen too many of his invoices.

The Court: You typed on the same typewriter?

A. Yes, sir. My typing is evener.

Mr. Hutchinson: That is the way I tried to type, your Honor, but I always brought two or three keys up at once and it did not work very well and I quit.

The Court: How long have you been typing?

A. I am not strictly a typist.

The Court: I didn't ask you that.

A. I am sorry, sir.

The Court: I didn't think that was your profession, but when did you first start typing?

A. I learned in school.

The Court: Where?

A. In Commerce High.

The Court: Did you keep continuing from time to time typing?

A. Yes.

The Court: Did you have at any time a machine of your own?

A. Yes.

The Court: Was this the machine?

A. No, I have a portable. [255]

The Court: Oh, you have a portable.

A. Yes.

The Court: All right.

(Testimony of Natalie Anis.)

Mr. McKnight: Q. Now, you say that Mr. Rolley had only retail sales until around Christmas of 1942, is that correct? I am talking about retail sales of this perfume and cologne.

A. No, he had wholesale prior to that time at 239 Geary.

Q. When did you move to 239 Geary?

A. We didn't move. I applied at that address.

Q. That is where you began work?

A. Yes.

Q. And he had wholesale sales of perfume there? A. Yes.

Q. To whom?

A. To a concern in Honolulu.

Q. But you have no records of that?

A. I do not.

Q. The first records you have of wholesale sales are in 1943 of Mr. Rolley's perfumes?

A. No.

Mr. Hutchinson: I think, counsel, you'd better establish whether she has the records.

Mr. McKnight: Q. That you have any knowledge of, goes back as far as 1943?

A. It was before 1943. [256]

Q. But you don't have them here today?

A. I don't have them in my hands, sir.

Q. What perfume is No. 35?

A. Red Carnation.

The Court: What is it?

A. Red Carnation.

The Court: How do you know that?

(Testimony of Natalie Anis.)

A. Because we have a price list and I memorized it when I started working.

Mr. McKnight: Q. Do you know the correspondent names for all the numbers?

A. Yes, sir.

Q. Was Mr. Rolley selling Forbidden Flame when you were with him? A. Yes.

Q. How long did you sell that?

A. If there was a call for it we had it in bulk.

Q. What was the number of that?

A. 15.

Mr. McKnight:

Redirect Examination

Mr. Hutchinson: Q. I have just one question, please, Mrs. Anis: Do you recall when the dye shop operation of Mr. Rolley was terminated, or closed out?

A. When we moved to 108 Geary. [257]

Q. In other words, you had the dye shop operation at 239 Geary, but when you moved you just opened up an exclusive perfume business?

A. We were more or less at the tail end of it.

Q. The dye shop work had been shrinking before that, is that true? A. Yes.

Mr. Hutchinson: I think that is all.

Recross Examination

Mr. McKnight: Q. Do you have any of your old labels that you used to cut into strips?

A. No.

(Testimony of Natalie Anis.)

Q. The only labels that you have now are those you have had on your lap only the last few minutes?

A. No, we have the old type sheet, but it is cut into individual strips as these.

The Court: Or sheets, you mean?

A. No, sir.

The Court: You said that you had them in sheets and cut them in strips.

A. That is the very first, then,——

The Court: That is as I recall the testimony.

Mr. McKnight: That is all, thank you.

The Court: Just a minute. I am going to ask you a few questions. [258]

Examination by the Court

Q. You don't mind my asking you a few questions? A. No, sir.

Q. Where do you live?

A. That depends.

Q. Where do you live now?

A. In Los Gatos.

Q. With whom? A. Friends.

Q. How long have you lived there?

A. Oh, maybe two months.

Q. And you lived in the City here before that time? A. Yes.

Q. Where? A. 1523 Sacramento.

Q. With whom? A. Alone.

Q. Where were you born? A. Japan.

Q. How long ago?

A. '14. Oh, I am sorry. How long? 1921.

(Testimony of Natalie Anis.)

Q. That is all right. Tell me when you first went to work? Do you recall that year, in this dye shop? That is where you were employed, if I followed your testimony? A. Yes, sir. [259]

Q. What kind of work did you do?

A. In the dye shop I dyed.

Q. How long did you do that?

A. About two or three years.

* * * * *

CHARLES A. ROLLEY

recalled, previously sworn.

Direct Examination

Mr. Hutchinson: Q. Mr. Rolley, I call your attention to the way in which you dispensed the perfumes during the early days and how they were labeled. In that connection, did you or did you not maintain a supply of bottled perfumes in the various fragrances, prepared in advance? [260]

A. A good many of them we had in what we call bulk. That is, a large, plain bottle. And then when we would sell it, we would take what we call a pipette, that was like a metal tube at the bottom and a syringe at the top, and a customer would buy a small bottle of perfume and we would take that pipette and fill that bottle with perfume and cap it and attach a label to it then.

Q. Was that the method in which you handled some of your bottling and labeling at the time you were associated with Mrs. Labhard?

(Testimony of Charles A. Rolley.)

A. Yes, that was.

* * * * *

Mr. Hutchinson: If the Court please, we have one other witness, a lady who is in Sacramento and can't be here today. I believe she will be here in the morning. [261]

* * * * *

VIVIAN ROLLEY

called as a witness for the defendant, sworn.

The Clerk: State your full name and occupation to the Court.

A. Vivian Rolley.

Direct Examination

Mr. Hutchinson: Q. You are the wife of Charles A. Rolley, are you not?

A. Yes, I am.

Q. And have been for a number of years, is that true? A. Yes.

Q. Calling your attention to 1932, 1933, and 1934, you were married at that time, were you not? A. No, previous to that—1927.

Q. During the years 1933, 1934, 1935, were you employed in any work?

A. Yes, for H. Leibes and Company.

Q. What was the nature of your duties in that place?

A. Well, I was selling, and then was promoted to floor manager, hostess. [263]

Q. That is, I believe, a retail store, is it not?

A. Yes, it is.

(Testimony of Vivian Rolley.)

Q. And specializes largely in wearing apparel, and other things of interest to ladies rather than men? A. That is right.

Q. That was true at that time? A. Yes.

Q. Do you recall your husband's business in the cleaning and rehabilitation of shoes and leather goods? A. Yes.

Q. Have you any recollection as to the time he started, if he did, to do something with perfume? A. Yes, I do.

Q. Do you recall when that was?

A. Around possibly '33.

Q. At that time you were employed on a full-time basis at H. Leibes & Company?

A. Yes.

Q. Did you have any conversation, or did you at any time visit the establishment of your husband? A. After work.

Q. In that connection, did you discuss with him his ideas for perfumes and starting a perfume line? A. Yes, I did.

Q. As a part of those conversations did you or did you not [264] discuss with him names or possible names for such product? A. Yes.

Q. I call your attention to the name Voodoo, and I will ask you if you at any time had any discussion with Mr. Rolley regarding that name as a name for perfume?

A. I certainly did. I was the one that suggested the name to him.

Q. Do you recall approximately when you suggested it to him?

(Testimony of Vivian Rolley.)

A. Well, I would say that it was about a year after he had made his first perfumes.

Q. Can you fix that as to the year by date?

A. I would say it was at, oh, the end of 1933 or around the first part of 1934.

Q. At that time did you have access—withdraw that, please. In the H. Leibes Company was there a perfume department, or any perfumery sales?

A. Yes. I worked in that department when I first went to work there.

Q. You were acquainted with the personnel of that department? A. Oh, yes.

Q. At the time you were discussing names with your husband for perfume products, did you resort to the Exhibit of Perfume at the H. Leibes & Company for reference to names and that sort of thing? [265]

A. Well, only inasmuch as we needed names for the perfumes, and naturally we didn't want to use names that someone else was using, so we were looking for something different.

Q. Did you make any inquiry of the other personnel of the H. Leibes & Company who dealt with perfumes with regard to the name Voodoo at the time you suggested it there? A. Yes.

Q. By the way do you recall the name of any of the persons you discussed that with?

A. Well, there was some literature there, or kind of a booklet, catalogue, whatever you want to call it, with names.

Q. Do you remember consulting that document?

(Testimony of Vivian Rolley.)

A. Yes.

Q. Could you describe in a brief way its composition?

A. Just a printed—just printed matter. I don't know what you would call it exactly. I had no name for it other than from an information standpoint.

Q. Did it contain names of manufacturers of perfumes and cosmetics? A. Yes.

Q. Did it list trade names of such companies, and did you make any search of it with regard to any of these names?

A. Yes, definitely.

Q. And did you, at that time, discover any reference to Voodoo? A. No. [266]

Q. Recalling your attention to the conversation you had with your husband on the subject of the name Voodoo, would you state briefly the conversation?

A. I am sorry, would you repeat that?

Q. Could you state briefly the conversation you had with Mr. Rolley concerning the name of Voodoo at the time you suggested it to him?

A. Well, the way I understand the question is this, that we had need of a perfume of a heavier, richer type, and after—because most of his perfumes were of a light, floral type; and so he made a perfume, and of course we had to have a name for it, and it seemed something with a heavier oriental type or something that was richer, so I suggested these names to him.

(Testimony of Vivian Rolley.)

Q. And that was in 1933 or 1934, as you recall?

A. Yes.

Q. Do you recall having been in Mr. Rolley's place of business subsequent to that time and having there observed the name Voodoo in any connection?

A. I am sorry, I don't get that very clear.

Q. Well, did you ever go to Mr. Rolley's place of business after 1934, or later and suggesting the name Voodoo to him?

A. Well, do you mean was I active in his place of business?

Q. No. I understand you didn't participate directly in the business? [267]

A. No, I didn't.

Q. But did you ever visit the place in 1934 or later? A. Oh, yes.

Q. Did you observe the name Voodoo exhibited in any manner? A. Yes, I did.

Q. Will you tell us briefly what you observed with regard to the name Voodoo?

A. Well, I saw the bottle as a finished package, with the contents in the bottle, and I saw the label and I also saw the labels before they were put on the bottle.

Q. Now, did you consult with your husband at the time this product was being worked out by Mr. Rolley, the Voodoo product?

A. Well, naturally I was interested.

Q. I have here a container bearing No. 54, and

(Testimony of Vivian Rolley.)
I will ask you to examine it and state what it is, if you know.

A. Yes, I remember it well. It is the original Voodoo, No. 54.

Q. Where did you last see this before coming here this morning? Did you bring the bottle?

A. I brought it.

Q. And where did you get it?

A. From my home.

Q. How long, if you know, was it in your home?

A. Well, I have had it for quite some time. I would say that that product is about, or that bottle is about sixteen, eighteen [268] years old.

Mr. McKnight: Your Honor, I am going to object at this time to this bottle, any further testimony in regard to it. It shows the number 54 thereon, and doesn't have the trademark Voodoo thereon, and I think it is incompetent, irrelevant, and immaterial to the issues in this case.

The Court: What is the purpose of the offer?

Mr. Hutchinson: To establish a use of the number, your Honor, and the fact that this was an original product, and the date of it, and the length of time.

The Court: For that limited purpose I will allow it.

Mr. Hutchinson: Thank you, your Honor.

The Clerk: Plaintiff's Exhibit J-1 admitted and filed in evidence.

(Bottle referred to was admitted into evidence as Plaintiff's Exhibit J-1.)

(Testimony of Vivian Rolley.)

Mr. Hutchinson: Q. By the way, Mrs. Rolley, the number 54 on this bottle, do you know what, if anything, that signified or meant in your husband's business at that time.

A. Yes. All our perfumes had a stock number, and that is the stock number on it.

Q. Mrs. Rolley, after 1934, did you at any subsequent time observe in Mr. Rolley's place of business Voodoo products with the name on the label attached to the container?

A. I would see them attached to the container, yes. [269]

Mr. McKnight: This is objected to, your Honor, unless the time is more definitely fixed.

The Court: Fix the time.

Mr. McKnight: He says after 1934.

The Court: Fix the time.

Mr. Hutchinson: Very well. We have to start somewhere, counsel.

Mr. Hutchinson: Q. You tell how frequently, and giving the years, if you know, subsequent to 1934 that you observed Voodoo products with such label identification?

A. As to the date, I think that at the end of 1933 or sometime the first part of 1934, was when the perfume was created and named and ready for sale, and since then.

Q. Did you see any in his place of business bearing that label in the year 1934?

A. Yes.

Q. And is the same true or not true with re-

(Testimony of Vivian Rolley.)

gard to the year 1935? A. Yes.

Q. Is your answer the same with regard to the years 1936, 1937, 1938, 1939 and 1940?

A. That is right. We have always had it.

Q. Subsequent to the time you worked at H. Leibes & Company, I believe you stated you did become directly associated with Mr. Rolley in his business, is that true? [270] A. In 1947.

Q. At that time you made it your full-time occupation during the daytime, is that right?

A. That is right.

Q. What were you duties in general at the Rolley establishment?

A. Oh, selling, and counter display and stock work, filling and labeling, and, oh, general.

Q. In that connection, did you have occasion at any time in 1943 or subsequently to sell any Voodoo perfume? A. In 1943? Yes.

Q. Yes. And is that true as to later on, 1944, 1945, and so on? A. That is right.

Q. In connection with the sales work, did you or did not you engage in selling for the Rolley Company outside of the retail store?

A. Yes.

Q. Could you tell us when and where you served as a sales agent or employee of Mr. Rolley outside of the retail establishment?

A. Meier & Frank in Portland, Oregon.

Q. What was the nature of that business, briefly?

(Testimony of Vivian Rolley.)

A. We had a concession for selling Rolley Perfumes.

Q. That is in the City of Portland.

A. Yes.

Q. Where was this concession with regard to the store, what [271] floor and so on?

A. Well, it was over by the what was then the elevator and stairway section, and information desk, directly across from the hosiery department.

A. That was on the main floor, yes.

A. That was on the main floor?

Q. Did you have any display of Rolley products there?

A. Oh, yes; it was all Rolley.

Q. I beg your pardon?

A. Everything in that department was Rolley's.

Q. Did you display any Voodoo products there?

A. Yes.

Q. Did they bear the Voodoo label?

A. They certainly did.

Q. What year was that? A. '43.

Q. And did you continue that concession beyond 1943? A. Yes, 1943, 1944, 1945.

Q. Were you personally present at all times or were there other persons working there?

A. Oh, no, I was—I couldn't stay there all the time. We had other sales people.

Q. Do you recall when, if at all, the concession arrangement was terminated?

A. Yes. It was during the War when help was very difficult. [272] I had trained a girl who was

(Testimony of Vivian Rolley.)
excellent. She got married and started a family, so she had to terminate her services, so, why, at various times I would go up there and assist in training other girls, and it became quite a problem, and the situation at the shop wasn't too helpful or conducive to perfume sales. I mean, it just wasn't the proper setup there.

Q. In this concession there was nothing sold but Rolley products? A. That is right.

Q. Was that incorporated physically in the perfume department of the store?

A. No, it was far removed from it.

Q. The Meier & Frank establishment did have a perfume department, is that right?

A. Yes.

Q. Do you remember when you withdrew your concession department at Meier & Frank, as to year?

A. It was after some discussion of the advisability of keeping it there longer due to the situation there, the way the department was situated and the help situation.

Q. And at that time what, if anything, was done with regard to sale or not selling directly by Meier & Frank of Rolley products?

A. Well, it was all agreed they were to put the perfume into the regular department. [273]

Q. Do you recall what year that was done?

A. I think that is around 1945.

Q. And did Meier & Frank thereafter buy Rolley Perfumes?

(Testimony of Vivian Rolley.)

A. Yes. They have never been without it.

Q. After 1945 did they buy Voodoo products?

A. They have always bought it.

Mr. Hutchinson: You may cross examine.

Cross Examination

Mr. McKnight: Q. Mrs. Rolley, at Meier & Frank in Portland, you say you had a concession there?

A. Yes.

Q. Was that an arrangement whereby you acted as an independent operator, or were you part of the store?

A. Oh, part of the store. I mean——

Q. Did you keep the profits or did the store?

A. The store kept it.

Q. What was the name of the other sales person who sold the Rolley Perfumes in Meier & Frank?

A. Joy Lewis.

Q. Was that her maiden name? A. No.

Q. How do you spell Lewis? A. L-e-w-i-s.

Q. Do you know her present address?

A. She is in Denver, Colorado. The last time I knew, she was [274] working in a department store there, but I haven't heard from her or seen her, been in contact with her for about two years, I would say.

Q. Was it the Fisher Department Store in Denver? A. No, I don't know.

Q. What was her maiden name?

A. I am sorry.

(Testimony of Vivian Rolley.)

Q. Do you remember the name and the other numbers of perfumes that were being sold in 1935?

A. Yes.

Q. What, for instance?

A. No. 26 was Garden Pinks.

Q. What was 39?

A. 39 was a perfume, a blend. I don't know.

Q. What number did Forbidden Flame have?

A. Forbidden Flame? I don't know.

Q. Didn't you sell Forbidden Flame——

A. No.

Q. ——at the Meier & Frank concession?

A. No.

Q. In 1935? A. I didn't, no.

Q. You didn't work for Mr. Rolley until 1943, is that true? A. That is right.

Q. In 1943, isn't that the time Mr. Rolley gave up the shoe [275] dye business? A. Yes.

Q. And devoted all his time to perfume?

A. That is right.

Q. What color was the label, the first Voodoo labels?

A. Gold with black printing.

Q. Have they always been the same as they are today?

A. No, there have been changes in the labels. They have always been gold with printing in black on them, but the material is a little different.

Q. Do you know who labels were obtained from prior to 1943?

A. No, I couldn't say. I didn't have any part of

(Testimony of Vivian Rolley.)

it, so I don't believe I would be able to tell you.

Q. You didn't make any sales of Voodoo perfume for Mr. Rolley prior to 1943, then?

A. No, I didn't.

Q. All you can testify to is that you saw some bottles around of Voodoo perfume? A. I did.

Q. Did you see the word Voodoo on the bottle?

A. I certainly did.

Q. Or was it like Exhibit J-1?

A. That is a stock bottle. That is not a perfume bottle, one that is for sale. That is a stock bottle.

Q. You haven't any of your original bottles of Voodoo perfume [276] with the trademark Voodoo appearing thereon, do you? A. Do I have?

Q. Yes. A. I have at home.

Q. But you haven't here this morning?

A. No.

Q. And you have no document here this morning to establish you sold Voodoo perfume any earlier than 1943, have you?

A. I am sorry, I didn't understand your question, please.

Q. Do you have anything in writing to show that you saw Voodoo or perfume bottles in Mr. Rolley's establishment prior to 1943?

A. No, I haven't anything written.

Q. Did you discuss this testimony prior to taking the stand with anyone?

A. Naturally, I did with my husband.

Q. You went over this matter with him, did you?

A. Yes, naturally.

(Testimony of Vivian Rolley.)

Q. Did he suggest any of the material that would be gone into?

A. He suggested only that I use my own memory and concentrate on it, which I have done.

Q. Do you consider the word Voodoo an oriental word?

A. Well, oriental, yes, I would think so.

Q. What connection does Voodoo have with the Orient? [277]

A. Well, I will tell you, I read a lot, and I read something when I was looking for a name and thinking we should have a name that was oriental, and I was reading something about Voodoo at that time. There was a tribe that practiced voodooism and that sort of thing, and it intrigued me.

Q. That isn't in the Orient, is it, Mrs. Rolley?

A. I wouldn't say whether—it had an oriental air to it, and that impressed me. That was my interpretation of the word.

Q. Do you know of any place where voodoo worship is indulged in in the Orient?

A. I am not an authority on that at all. The article I read was pertaining to that was so rather shocking to me, to my senses, whether it was written in truth or fiction or imagination or something, but that name appealed to me, and that was my interpretation of an oriental fragrance. I am not an authority.

Q. You don't associate Voodoo with voodoo worship on the Island Haiti in the Carribean?

A. I don't associate it, no.

(Testimony of Vivian Rolley.)

Q. What does Tabu mean to you?

A. Oh, something illegal, or——

Q. Did you sell Tabu perfume at H. Leibes when you were there in the perfume department?

A. I don't know. [278]

Q. You have never heard of Tabu?

A. I have, yes.

Q. Wouldn't you say it was one of the world's most prominent perfumes?

Mr. Hutchinson: If the Court please, I think puffing the plaintiff's product, the witness I don't think should have——

A. (interposing) I could answer that. I think it is a matter of opinion.

Mr. McKnight: Q. I didn't hear you.

A. I think that is a matter of opinion.

Q. When did you first hear of Tabu perfume?

A. Oh, I would say it was about twelve to fifteen years ago, roughly speaking.

Q. That would be sometime in the late '30s?

A. Oh, yes.

Mr. McKnight: That is all.

Mr. Hutchinson: That is all, thank you very much, unless the Court has a question.

The Court: That is all.

[Endorsed]: Filed Dec. 14, 1951.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT

Proceedings on Motion for New Trial

Friday, April 11, 1952

Mr. Hutchinson: I am J. Albert Hutchinson, one of counsel of record for the defendant and cross-complainant, Rolley, Inc. Other counsel of record are Joseph A. Brown and Harry Gottesfeld.

Mr. MacKay: William G. MacKay for the plaintiff.

Mr. Hutchinson: This is a motion for new trial after judgment in favor of the plaintiff and cross-defendant. The case, as the Court will recall, involved the ownership of the trademark and trade name Voodoo as relating to cosmetic products, particularly perfume and toilet water and similar items used for cosmetic purposes.

(Oral arguments omitted upon request of counsel.)

Mr. Hutchinson: There is only one other point to which I will call Your Honor's attention, and that is on the question of whether the defendant and cross-complainant should be required to deliver its property to plaintiff as the judgment now provides.

The Court: What property?

Mr. Hutchinson: The judgment reads: "That the defendant deliver up to plaintiff's counsel all labels, signs, prints, advertising leaflets, catalogs, price lists, packages, wrappers, receptacles and other

things, and all plates, molds and other devices for making the same, in the possession or under the control of the defendant which unlawfully bear the designation Voodoo."

The Court: It has nothing to do with the product he produces. It is only the label.

Mr. Hutchinson: I don't know what "other things" means, Your Honor.

The Court: That is all that was intended, is it not?

Mr. McKay: That is right, Your Honor. It is the usual provision.

The Court: Let me say kindly to you that I was in complete sympathy with your client, starting at a shoe stand up there, and he had some ability and developed this perfume, but he clearly violated the law.

Mr. Hutchinson: With respect to Voodoo, Your Honor.

The Court: Yes.

Mr. Hutchinson: In what manner, sir?

The Court: You are familiar with the record?

Mr. Hutchinson: Yes I am.

The Court: I say that kindly. I was trying to find a way to help him sympathetically, which has no place in the law.

Mr. Hutchinson: It equity, I think, Your Honor; not sympathy, to be sure.

The Court: I make that statement to you so that you may have some record on it. I have re-hashed this case in the manner you suggest. It has been gone over. I will hear from counsel.

Mr. McKay: Your Honor, I am appear, as you know, as local counsel in this case. My associate, Mr. McKnight of Chicago, sent in a brief which we took the liberty of filing, and he instructed me to rely on his brief. So unless Your Honor had some questions——?

The Court: No question in my mind. Now, I hope if this case goes forward you prevail. It won't hurt my pride the least bit. Motion will have to be denied.

Mr. Hutchinson: Thank you, Your Honor.

* * * * *

[Endorsed]: Filed May 16, 1952.

[Endorsed]: No. 13389. United States Court of Appeals for the Ninth Circuit. Rolley, Inc., Appellant, vs James L. Younghusband and Howard Younghusband, co-partners, doing business as Consolidated Cosmetics and Les Perfums de Dana, Inc., Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed May 20, 1952.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Judicial Circuit

Civil Action No. 13,389

JAMES L. YOUNGHUSBAND and HOWARD YOUNGHUSBAND, co-partners, doing business as Consolidated Cosmetics, and Les Parfums de Dana, Inc., Plaintiffs,

vs.

ROLLEY, INC., Defendant.

ROLLEY, INC., Cross-Complainant,

vs.

JAMES L. YOUNGHUSBAND and HOWARD YOUNGHUSBAND, co-partners, doing business as Consolidated Cosmetics, and Les Parfums de Dana, Inc., Cross-Defendants.

APPELLANT'S STATEMENT OF POINTS AND DESIGNATION

To the Honorable Paul P. O'Brien, Clerk, United States Court of Appeals, in and for the Ninth Judicial Circuit:

Pursuant to rule 19, Rules of the United States Court of Appeals of the Ninth Circuit, and rule 75, Rules of Procedure of the Supreme Court of the United States, appellant respectfully submits herewith its statement of the points on which appellant intends to rely on upon said appeal and the designation of the record which is material to the consideration of the appeal.

Appellant's Statement of Points to Be Relied Upon on Appeal

The points on which appellant intends to rely may be concisely stated as follows:

I.

The evidence is insufficient to justify the judgment, including, but not limited to, findings respectively numbered 3, 4, 5 and 6;

II.

The judgment is contrary to the evidence, including, but not limited to, the findings thereof respectively numbered 3, 4, 5 and 6;

III.

The judgment is contrary to law and equity, and more particularly in that it declares valid and protectible by injunctive process a trade name and mark resting entirely upon registration with appropriate agencies of the United States of America—where (1) there is no evidence of actual use of the trade name and mark; (2) there is no evidence of pretended use of the trade name and mark for more than four years after registration; (3) such a pretended use for less than two years was voluntarily abandoned for more than three and one-half years; and (4) appellant's lawful appropriation and extensive, open, notorious and continuous use of the trade name and mark continued for more than five years prior to the commencement of the action and such trade name was acquired from appellant's predeces-

sor in interest after a prior use of more than three years;

IV.

Appellant was prevented from having a fair trial by errors, including, but not limited to: (1) the presentation and receipt of evidence respecting asserted conduct by appellant's predecessor in interest, relating to (a) other and unrelated trade names and marks asserted by Appellees and (b) asserted trade names and marks not owned or claimed by any party, or any predecessor in interest of any party, to the action; (2) the overruling of appellant's timely and valid objections to the offering and recepit of such evidence; and (3) the denial of appellant's timely and appropriate motion to strike said evidence;

V.

The judgment and decree includes unnecessary and mischievous recitals of purported fact, including, but not limited to, those set forth in paragraphs 7 and 8 of the findings therein, which are also contrary to the evidence in that such evidence establishes: (1) that neither appellant nor its predecessor in interest has ever used any of the trade names or marks set forth in paragraph 7 of said findings; (2) that the appropriation and use of the trade name and mark Forbidden Flame was, in fact, adopted and used by appellant's predecessor in interest prior to any asserted registration or use of the trade name and mark Forbidden Flame referred to therein; and (3) appellant has not at any time used any of the names, or any name bearing

any resemblance to any of the names, set forth in paragraphs 7 and 8 of said findings;

VI.

The conclusions of law in paragraphs 9 through 12 set forth in said decree are contrary to the evidence and to law, in such cases made and provided, and to applicable principles of equity;

VII.

The provisions of paragraphs 13 through 14 are contrary to the evidence and to law, in such cases made and provided, and to applicable principles of equity;

VIII.

The judgment and decree erroneously provides for the imposition of costs upon the appellant, whereas a substantial and major portion of the relief sought by appellee has been denied appellees and a major portion of such costs relate to issues as to which such relief will have been so denied;

IX.

The Court erroneously denied appellant's motion for a new trial.

Designation of Material Portions of
The Record on Appeal

Appellant hereby designates the material portions of the record on appeal on which appellant intends to reply, to be made up and printed, as follows, namely:

I.

Appellees' complaint, excepting the prayer and verification, commencing with line 8, page 4;

II.

Appellant's answer and cross-complaint, excepting the prayer and verification, commencing with line 11, page 9;

III.

Appellees' answer to appellant's answer and cross-complaint, except the prayer and verification, commencing with line 11, page 5.

IV.

Order of the Court adding Les Parfums de Dana, Inc., as a party defendant;

V.

Judgment;

VI.

Appellant's motion for a new trial;

VII.

Writ of injunction;

VIII.

Reporter's transcript of testimony and oral proceedings, objections, motions and rulings of the Court, appearing in the Reporter's transcript of the proceedings for the 14th, 15th and 16th days of November, 1951, commencing and concluding at the following pages and lines, inclusive, of Reporter's transcript of the proceedings on said dates, namely:

* * * * *

IX.

Reporter's transcript of oral proceedings on motion for new trial, appearing in the Reporter's transcript of the proceedings for the 11th day of April, 1952, commencing and concluding at the following pages and lines, inclusive, of Reporter's transcript of the proceedings on said date, namely: Page 2, Line 1, through Page 4, Line 7.

Respectfully submitted:

HARRY GOTTESFELD,
JOSEPH A. BROWN,
HUTCHINSON & QUATTRIN
/s/ By J. ALBERT HUTCHINSON

Attorneys for Defendant, Cross-Complainant and Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Jun. 10, 1952. Paul P. O'Brien Clerk.

[Title of U. S. Court of Appeals and Cause.]

PLAINTIFFS-APPELLEES' ADDITIONAL DESIGNATION OF RECORD

In accordance with Rule 19 of this Court, plaintiffs-appellees designate the following additional parts of the record which they think material to the consideration of the appeal and request that the same be printed as part of the same record.

1. The balance of the complaint beginning with page 4 line 9 through to the end on page 6.

2. The balance of plaintiffs' answer to defendant's cross complaint beginning with page 5 line 11 through to the end of page 5.

3. Defendant's motion for leave to file cross complaint and bring in additional parties, and order thereon of June 7, 1950.

4. Plaintiffs' motion for preliminary injunction.

5. Affidavit of John D. Gaumer in support of plaintiffs' motion for preliminary injunction.

6. Injunction order of December 28, 1950.

7. Plaintiffs' response to defendant's motion for a new trial.

8. Order of April 15, 1952, denying motion for a new trial.

9. Copy of the additional designation.

10. The following additional portions of the Official Reporter's Transcript for the proceedings in the District Court on November 14, 15 and 16, 1951, commencing and concluding at the following pages and lines thereof:

* * * * *

/s/ JAMES R. McKNIGHT
/s/ WILLIAM G. MacKAY
Attorneys for Plaintiffs-Appellees.

Acknowledgment of Service attached.

[Endorsed]: Filed June 16, 1952.